Ambient Air: Comment Record No. 1

Submitted on 11/09/2018 6:47PM
Submitted values are:

First Name: Bart
Last Name: Brashers
Organization:
Comment: I'm disappointed this Draft Guidance did not address the concept of "buildings". A number of facilities have railroads or highways/roads that go through them. Are the passengers in a train car inside a "building", which would allow the facility to treat the portion of the railway inside their property as "non-ambient air"? If a facility installed "no stopping" signs along the portion of a public road that crosses through their facility to discourage motorists from stopping for an hour-long picnic, would they still have to meet the 1-hour NAAQS along that portion of the road? I urge the EPA to expand the Guidance to apply common sense to situations where the public has "indoor" (in an automobile or rail car) transitory access.

Ambient Air Comments: Record No. 2

Submitted on 11/19/2018 9:44PM
Submitted values are:

First Name: Mary Beth
Last Name: Bass
Organization:
Comment: Do not weaken protective air quality regulations by redefining ambient air. Living things need breathable air. Are there any scientists left at the EPA?

Ambient Air: Comment Record No. 3

Submitted on 11/20/2018 8:30AM
Submitted values are:

First Name: Lisa
Last Name: Chibis-Tapper
Organization: None...
Comment: So like the old timey smoking and non smoking sections in restaurants? Air is not stagnant. No!!!!! Just No!!!!! Please stop!! What are you doing? I have children...don't you?

Ambient Air Comments: Record No. 4

Submitted on 11/26/2018 12:51PM
Submitted values are:

First Name: Andrew
Last Name: Shroads
Organization:
Comment:
1. While providing greater flexibility to the applicant in establishing the facility boundaries and receptor grid placement, this will increase review requirements for the local/state/tribal air agency. Agency permit writers will effectively be establishing what are acceptable and unacceptable forms of deterring or precluding public access, which is far beyond the mission statement of an air permitting agency. Considering that EPA cites "large tracts of undeveloped private land" as a possible, effective deterrent, air agencies will have to make a judgement as to the likelihood of trespassers on unmarked private lands in determining if the applicant's proposed measures are sufficient for deterring public access.
2. Would the measures proposed by the applicant be stipulated in the air permit? For other EPA programs, permits and plans do include the facility's specified security measures for denying access to the property or facility.
Would the air agency inspector have to verify compliance with this permit term by reviewing the site security plan?
3. Would the determination by the air agency be subject to public comment? If it is not included as a permit term or condition and is only included as the receptors used in the air dispersion model, a facility could extend its receptors to demonstrate compliance with the NAAQS, without the public having comment on where those boundaries are located and whether or not their exists public uses within those boundaries.
4. Private lands have been and are continuing to be used for public purposes.
From waterway access, to the construction of squatter shanties or hunting cabins, there is a long case history of private property owners declining to enforce site boundaries, that are eventually encroached upon by the public.
The local/state/tribal air agency would have to review local ordinances and case law, as well as verifying the information provided by the facility that no such encroachments exist, to determine if there are any allowed public uses due to the lack of previous site security enforcement by the private property owner. A facility can claim its property boundaries are enforced, but how is the permitting agency to verify that there is no encroachment on those boundaries?
5. Are public rights-of-way or areas within a facility open to the public excluded or included in the ambient air? Private property owners can have public access parking and areas within the facility property that are open to the public.

Ambient Air Comments: Record No. 5

Submitted on 12/05/2018 11:29AM
Submitted values are:

First Name: Mark
Last Name: Derf
Organization: Indiana Department of Environmental Management Email address: mderf@idem.in.gov
Comment:
Indiana strongly supports this revised policy on exclusions from "Ambient Air". The advances in technology over the past several years has provided additional effective preclusion of public access to areas.

Indiana would like clarification on roads or railroad tracks that intersect a source's property. Also, there is question about waterways that are adjacent to a source's property. The modeling demonstrations for the 1-hour SO2 NAAQS brought several of these issues to light and whether a monitor could be located in an area. While this modeling applied to designations, it does emphasize the probability of exposure of the general public to an area for an hour or more.

Indiana is already considering this revised policy in reviewing measures to deter public access in its own modeling policies and what the state will require for New Source Review, Prevention of Significant Deterioration and State Implementation Plan dispersion modeling. The approach of applying "a rule of reason" to access the measures to preclude the general public to an area will be followed by the state.

Indiana looks forward to continuing to work with Region 5 staff and the Ambient Air Review Team (if necessary) to determine appropriate and reasonable modeling boundaries that are protective of public health.

Thank you for the opportunity to comment on this revised policy.

State of Wisconsin
DEPARTMENT OF NATURAL RESOURCES
101 S. Webster Street
Box 7921
Madison WI 53707-7921

Scott Walker, Governor
Daniel L. Meyer, Secretary
Telephone 608-266-2621
Toll Free 1-888-936-7463
TTY Access via relay - 711

December 5, 2018

New Source Review Group
Mail Drop C504-03
U.S. Environmental Protection Agency
Research Triangle Park, NC 27711

Subject: Draft Guidance "Revised Policy on Exclusions to Ambient Air"

Dear Sir or Madam:

The Wisconsin Department of Natural Resources (WDNR) appreciates the opportunity to comment on U.S. EPA's "Revised Policy on Exclusions to Ambient Air", as presented in the draft dated November 2018.

The stated purpose of U.S. EPA's revised policy is to make a limited change to the regulatory definition of ambient air while maintaining public health protection. This change will ensure consistency in dispersion modeling analyses across the country by accounting for additional measures that are effective in precluding access by the general public. WDNR encourages U.S. EPA to finalize the changes proposed in this guidance.

Thank you for the opportunity to comment on this draft guidance. Please contact John Roth at john.roth@wisconsin.gov, or 608-267-0805 if you have any questions regarding these comments.

Sincerely,

Gail E. Good

Gail E. Good
Director, Air Management Program
Wisconsin Department of Natural Resources

South Coast
Air Quality Management District
21865 Copley Drive, Diamond Bar, CA 91765-4182
(909) 396-2000 • www.aqmd.gov

Office of the Executive Officer
Wayne Nastri
909.396.2100, fax 909.396.3340

December 12, 2018

***Submitted electronically to:* Ambient_Air_Guidance@epa.gov**
Andrew K. Wheeler, Acting Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Draft Guidance: Revised Policy on Exclusions from "Ambient Air"

Dear Administrator Wheeler,

The South Coast Air Quality Management District staff appreciates the opportunity to provide comments on the November 2018 draft guidance entitled *Revised Policy on Exclusions from 'Ambient Air.'* EPA's website for New Source Review Permitting indicates this draft document was posted on November 9 and that EPA will accept public comment through December 21, 2018. The draft guidance would revise EPA's policy on the exclusion of certain areas from the scope of "ambient air" under the Clean Air Act (CAA) and EPA's regulations. The regulatory definition of ambient air is "that portion of the atmosphere, external to buildings, to which the general public has access." *See* 40 CFR 50.1(e). In 1980, EPA Administrator Douglas Costle wrote a letter interpreting this definition to provide an exemption from ambient air "only for the atmosphere over land owned or controlled by the source and to which public access is precluded by a fence or other physical barriers." The draft guidance would replace "a fence or other physical barriers" with "*measures, which may include physical barriers, that are effective in deterring or precluding access to the land by the general public*." Draft Guidance at 5. The draft guidance offers that effective measures might include the use of no trespassing signs without fencing or the measure of an area "having atypical public access such as swamps or large tracts of undeveloped private land." Draft Guidance at 6.

As described in further detail in our comments below, we believe the draft guidance is substantively problematic and not consistent with the definition of ambient air under the Act and under EPA's regulations. While we believe there may be a narrow basis to extend the outer continental shelf permitting principles that were judicially upheld in *REDOIL v. EPA*[1] to the

[1] *REDOIL v. EPA*, 716 F.3d 1155 (9th Cir 2012).

permitting of stationary sources on land, we suggest any such regulatory changes should be pursued only through notice-and-comment rulemaking. Aside from this, as a fundamental aid to transparency in your guidance formulation process, we respectfully request that EPA establish a "nonrulemaking" docket at *Regulations.gov* for placement of this and all other comments received on the November draft. As far as we are aware, this would be feasible, pose no costs to your agency, and be fully consistent with agency stated commitments to transparency. The provided comment box interface appears to be an inelegant means of taking stakeholder input when *Regulations.gov* would easily and better serve to securely receive and retain stakeholder-signed letters that organizations of all types conventionally submit.

As was noted in the 1980 Administrator Costle letter, CAA section 123 stands to prohibit dispersion techniques that might circumvent otherwise required emissions limitations in an implementation plan. By this reference, Administrator Costle was evidently on guard against facilities using gamesmanship to invalidly and artificially expand the area of an ambient air exclusion beyond the established operational footprint. Fence relocations or property acquisitions intended to avoid or lessen the application of the Act's requirements may constitute prohibited dispersion techniques under section 123. EPA policy should affirm this principle and not undermine it.

Aside from these circumvention considerations, EPA must recognize that it cannot lawfully adopt any interpretation that would be inconsistent with 40 CFR 50.1(e) or the requirements of the Clean Air Act. By our review, the draft guidance is erroneous on this count in two major respects.

First, the revised policy would violate the Act's requirement that the bounds of ambient air must always and necessarily encompass areas protected by a secondary National Ambient Air Quality Standard (NAAQS). This requirement is no doubt implicit in the definitional scope of ambient air, including as defined at 40 CFR 50.1(e). Clean Air Act section 109(b)(1) defines a secondary NAAQS as a specified level of air quality that is requisite to protect the public welfare from adverse effects associated with the presence of the pollutant in the ambient air. Welfare effects as defined in CAA section 302(h) include "effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being." Thus, it is striking that the draft guidance should mention "swamps" and "large tracts of undeveloped private land" as potentially being excluded from "ambient air" (Draft Guidance at 6), in light of secondary standards that were expressly established to protect such areas, regardless of human presence, in order to prevent harms to vegetation and land, freshwater, and estuarine ecosystems.[2] Adding to this, it is concerning that certain, vague language in the draft (e.g., in the reference to "private" land) might be meant to countenance

[2] Contrastingly, the secondary NAAQS were not established to address effects on oceanic waters; thus, the outer continental shelf permit cases at issue in the 9th Circuit *REDOIL* decision were reasonably not engaged with this point.

arrangements with neighboring properties that would not be owned or leased by the stationary source. Under existing policy as compelled by the Act, neighboring property owners (and their invitees and trespassers alike) are people who breathe ambient air and belong to the general public. EPA cannot allow creative or collusive transactions with neighboring properties (e.g., contracts, easements or other non-possessory interest arrangements) that might have the design of arguing those neighboring areas do not thereby have or need NAAQS protection. Any such practices would be unqualified cases of circumvention.

Second, section 50.1(e)'s language regarding air "to which the general public has access" must be read to exclude no more than those facility areas with barriers that can reasonably be considered fixed at the time of permitting and permanent for the operational life of the facility. The limits assigned by a prevention of deterioration (PSD) permit or an implementation plan are conceivably one-time impositions. A virtual fence line, in contrast, is not necessarily permanent or fixed according to the operational footprint of a facility and is conceivably subject to change during the life of a facility. Perhaps, for example, the mentioned "large tracts of undeveloped land" (Draft Guidance at 6) would become a housing tract in ten years. Virtual fence lines thus cannot be allowed to substitute for legitimate physical barriers when the (1) the extent of those non-physical measures may not correspond with the facility's operational footprint and (2) relatedly, the permanency or stringency of those non-physical measures cannot be assured for the life of the facility.

While the draft guidance only suggests it would be pertinent to the federal PSD permitting context, we are also concerned that the unnamed stakeholders who pressed for a revised policy may instead have greater interest in where ambient air is demarcated for purposes of designating areas as meeting or not meeting an applicable NAAQS. To the extent the unnamed stakeholders or the EPA now desires changes for this area of CAA implementation and not merely for "issuance of federal PSD permits" (Draft Guidance at 7), the issue must be transparently addressed.[3] Accordingly, it does not suffice for the draft guidance to downplay the offered policy change by reference to supposed continuity that comes from each air agency abiding the "definition of ambient air contained in its approved program" (Draft Guidance at 7). Uncertainties and potential abuses that will arise if the draft policy is finalized would expectedly affect CAA implementation in all areas and without regard to PSD permit program approval status.

These identified inconsistencies with 40 CFR 50.1(e) demand that the EPA's interpretation can only lawfully be pursued through notice and comment rulemaking and only then to the extent the Act would allow it. While the reasoning in the Ninth Circuit's *REDOIL* decision cannot uncritically transfer to land-based permitting, we see that it does, to a limited degree, suggest

[3] For example, there should be no doubt that a facility cannot be advantaged with an ambient air exclusion when it might acquire a 5-year lease over some neighboring land just to cover some period of scrutiny for designations purposes, i.e, where receptors on that area of leased land are being studied for possible violations of a tightened NAAQS.

flexibilities in Administrator Costle's "fence or other physical barriers" policy that might be allowed consistent with the Act. The draft guidance, however, does not appear to appreciate or articulate the underlying basis for the *REDOIL* decision. As was consistently stressed by that reviewing court, the outer continental shelf permits under challenge were **conditionally** issued. *See REDOIL*, 716 F.3d at 1158, 1159 and 1169. For example, the court's decision stated the ambient air exemption was supportable because "EPA **conditioned** Shell's permit and ambient air exemption on the establishment of an effective safety zone that precludes public access." *See id*. at 1169. On review of the permit language, these conditions were nothing less than enforceable permit conditions requiring measures to preclude public access.[4] Similarly, it may be defensible to allow facilities, in special cases, to propose enforceable permit conditions to establish an effective virtual fence line when it is assured that such conditions would be adequate to exclude all possibility of effects on the public or welfare. The relaxation of any such permit conditions, however, should be an event that triggers source obligations to ensure the NAAQS are protected in areas that were formerly not in the bounds of protected ambient air for purposes of the original permitting of NAAQS pollutants. To explore this potentially lawful approach, EPA should undertake notice-and-comment rulemaking and consider adding language to allow permit conditions for measures for non-physical barriers that serve to exclude the public on a permanent and enforceable basis (provided, first and also, that the areas are not protected by a secondary NAAQS). Any such change would require necessary clarification for those source obligations that would apply when such permit-based restrictions are relaxed. We recommend language to trigger a renewed NAAQS review that might be functionally comparable in protectiveness and deterrence of circumvention to the 40 CFR 52.21(r)(4) provision for renewed major source applicability on the relaxation of a synthetic limit.

Aside from our above-stated concerns, we see the draft guidance as suggesting a drastic departure from decades of precedent on one of the Act's core definitions. The change would add burdens and uncertainty to the paramount work of regulators to assure compliance with the NAAQS, but it also requires attention that ambient air is a definitional element for other programs, including programs to protect against air toxics. Thus, in considering new exclusions from ambient air in the statute or in regulation, there must be great caution against creating destabilizing inconsistences with statutory demands and historic implementation practices recognized across all federal and state programs to address air pollution.[5] Given the likelihood

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[4] The underlying decision of the Environmental Appeals Board in fact documented the precise terms and conditions of the "Chuckchi" and "Beaufort" permits. *See In Re Shell Gulf of Mexico, Inc. & Shell Offshore*, Inc., 15 E.A.D. 470, 511-512, FN53 (EAB 2012). These permits expressly stated that operations were not authorized unless: (1) Shell's vessel would be "subject to a currently effective safety zone established by the [Coast Guard]" of "at least 500 meters from the center point" of the vessel that would prohibit incursions by members of the public; and (2) Shell has "developed in writing and is implementing a public access control program" to intercept the general public "by radio, physical contact or other reasonable measures" and to communicate "restrictions on activities" to the North Slope communities "on a periodic basis when exploration activities are expected to begin and end at a drill site." *Id.*

[5] *See* CAA section 302(g) (defining "air pollutant" to mean any air pollution agent "which is emitted into or otherwise enters the ambient air"). As an aside on this subject, we note that page 3 of the draft guidance makes errant reference to the 2010 standard for "nitrogen oxide."

of litigation and the uncertainty that the draft guidance invites major sources to bring into the regulatory scheme, we ask that the draft guidance not be finalized until all stakeholder concerns can be reasonably and fully addressed through notice-and-comment rulemaking.

Thank you for this opportunity to comment on this draft guidance. If there are any questions concerning the District's comments, please contact Mr. Brian Tomasovic, Senior Deputy District Counsel, at (909)396-3425 or btomasovic@aqmd.gov.

Sincerely,

Wayne Nastri
Executive Officer

Enclosure
WN/BT/

Draft 11-28-16

Dear U.S. Environmental Protection Agency,

Southern Illinois Power Cooperative ("SIPC") is pleased to provide the following comments on the U.S. Environmental Protection Agency's ("EPA") November 18th draft "Revised Policy on Exclusions from 'Ambient Air'" (the "Policy"). SIPC owns and operates coal and natural-gas fired generation plants in Williamson and Washington Counties, Illinois. As a generation and transmission cooperative, SIPC provides wholesale electric power to over 100,000 end-use customers in Illinois as well as to its member distribution cooperatives.

SIPC generally supports the proposed Policy and agrees that any measure(s) that provide "reasonable assurance that the general public will not have access" should serve to exclude an area from consideration as "ambient air." To that end, however, SIPC does not believe that source ownership or control is a required element to preclude public access. On many stretches of public roadways, for example, the public has no meaningful exposure to the outside air apart from a brief period inside a moving motor vehicle. EPA should revise the Policy to clarify that <u>any physical structure or area, regardless of ownership or control, which provides reasonable assurance that the public will not have prolonged access (and, therefore, exposure) cannot constitute "ambient air."</u>

<u>Comment:</u>

SIPC agrees with EPA that "it is appropriate to exclude the atmosphere over land owned or controlled by the stationary source, where the owner or operator of the source employs measures, which may include physical barriers, that are effective in deterring or precluding access to the land by the general public." But if the goal, as EPA contends, is to "maintain[] public health protection," there is no reason to subject areas where public access for any meaningful period of time is reasonably prevented to air quality analyses. The fact that a certain area may not be under the ownership or control of the stationary source does not change this underlying basis for excluding certain areas from what is considered to be "ambient air."

For the following reasons, SIPC contends that EPA's Policy should clarify that physical structures or areas (external to buildings) in which there is reasonable assurance that the public will not have prolonged exposure to the outside air do not constitute "ambient air," regardless of ownership.

First, SIPC's proposed clarification is consistent with the regulatory definition of "ambient air." "Ambient air" is defined as "that portion of the atmosphere, external to buildings, to which the general public has access." 40 CFR 50.1(e). The element of ownership or control makes sense in the context of ensuring that a stationary source can control, maintain or operate *a measure* that reasonably prevents public access on private property. But not all areas that prevent public access are controlled or owned by a source. The plain language of the definition of "ambient air" recognizes this by broadly encompassing any area to which the public has "access." "Access" is determinative. EPA's Policy should, at a minimum, clarify that ownership or control is not always required to preclude public access.

Second, public access should not include areas where measures have been taken or physical conditions exist that prevent prolonged access. EPA's Policy already recognizes that "measures may be considered to be acceptable *even if they are not 100 percent effective in preventing public access.*" In other words, whether an area constitutes ambient air is more than a mere binary question of whether the public does nor does not have access. EPA's Policy should clarify that state agencies can consider the *nature of the public's exposure to the air due to the restrictive nature and/or the mode of that access* when determining whether the area constitutes "ambient air." Public roadways adjacent to a stationary source are a prime example.

There are many examples of public road segments where the public does not have prolonged exposure – *i.e., exposure* is generally less than a couple of minutes. Many public roads do not permit a motor vehicle to stop on the road. Guard rails and narrow road shoulders may allow a vehicle to pull over in an emergency, but they do not allow for parking and discourage stopping. No parking signs also discourage prolonged public exposure to the air on the controller road segment. Further, the public's "access" to the air around a stationary source is usually short enough in distance that it is traversed by the public (inside their motor vehicles) in a short period of time. Although the public has access to the road, the exposure to the air is minimal. It certainly does not generally persist long enough to permit any meaningful exposure – which at its most stringent has been repeatedly defined by EPA as exposure to ambient air of at least one hour, the most stringent averaging time to determine compliance with any current primary or secondary National Ambient Air Quality Standard ("NAAQS") (*e.g.,* the averaging time for the current Sulfur Dioxide NAAQS is 1 hour for the primary public health-based standard).

For example, there is a roadway adjacent to SIPC's Marion Station generating plant in Williamson County that should not constitute "ambient air" when applying the intent of EPA's proposed Policy. The roadway, known as Lake Egypt Road, occupies a short stretch of road that traverses the plant's cooling lake dam. A number of factors reasonable assure that any meaningful public access to the air above the portion of Lake Egypt Road adjacent to SIPC's facility is prohibited:

- The road is bookended on the south side by a guardrail and water (the plant's cooling lake) and on the north side by a fenced area that is under surveillance by SIPC 24 hours a day, 7 days a week, 365 days a year;
- The speed limit on the road is 45 mph for most of the section (the rest is 55 mph), limiting the likelihood that a vehicle would stop on the road (apart from an infrequent emergency such as a breakdown);
- A vehicle traveling at 45 mph on Lake Egypt Road would traverse the Marion plant property in less than a minute (even at 35 mph, a vehicle would traverse the entire stretch in just over one minute);
- Drivers are discouraged from stopping on the road because the road shoulders are extremely narrow and have sides lined with guard rails; in addition both sides are too narrow to safely allow parking without impeding traffic on the road (*i.e.,* the

south side of the road's shoulder measures just over 7 feet from edge of the pavement to a line directly below the guard rail, and the north side is even more restrictive, measuring a mere 5 feet 7 inches); and

- Because the roadway runs adjacent to SIPC's property, SIPC could add signage on its property (*e.g.,* no parking signs) and employ video surveillance and security guard measures emanating from its property to minimize the length of time any vehicle may stop along the public roadway.

The fact that SIPC neither owns nor controls access to the road does not diminish the fact that the public has minimal access (both physically and temporally) to this area. The section of Lake Egypt Road adjacent to SIPC's Marion plant acts as a physical barrier to public access. Therefore, including the roadway as "ambient air" serves no public health protection purpose because public exposure is, at worst, de minimis, at any given time.

In sum, SIPC believes that EPA can and should clarify in its final Policy that state agencies may exclude from any ambient air quality analysis physical structures like roadways that reasonably assure that prolonged public exposure to the air is prevented, regardless of source ownership. The absence of ownership or control should not make otherwise non-ambient air, ambient.

SOUTH CAROLINA MANUFACTURERS ALLIANCE

February 19, 2019

VIA ELECTRONIC AND US MAIL
United States Environmental Protection Agency
1200 Pennsylvania Ave, N.W.,
Washington, D.C. 20460
Ambient_Air_Guidance@epa.gov

Re: Comments in support of Draft "Revised Policy on Exclusions from Ambient Air"

Dear Sir or Madame:

In November of 2018, the United States Environmental Protection Agency (EPA) published draft guidance entitled "Revised Policy on Exclusions from Ambient Air" ("Ambient Air Guidance"). The South Carolina Manufactures Alliance (SCMA) is writing in support of the Ambient Air Guidance to request EPA finalize the Ambient Air Guidance. The SCMA is an organization with represents more than 400 facilities with over 80,000 employees operating and working in South Carolina.

I. BACKGROUND

In the draft Ambient Air Guidance, EPA proposes to continue and expand a 1980 policy on the exclusion of certain areas from the scope of "ambient air" under the Clean Air Act and EPA regulations. The regulatory definition of ambient air remains unchanged under the new Ambient Air Guidance as "that portion of the atmosphere, external to buildings, to which the general public has access." EPA's revised Ambient Air Guidance does, however, clarify Federal authority to regulate localized air emissions; certain areas outside of "buildings and structures" to which the public does not have access will now fall outside of to the term Ambient Air under the Ambient Air Guidance, allowing more flexibility on permitting and modeling. The SCMA membership supports the revised

approach.

II. PUBLIC COMMENT

For the following reasons, the SCMA recommends EPA finalize the Ambient Air Guidance and update it to be consistent with regulatory developments and the Clean Air Act.

1. Physical Barriers No Longer Required

The Ambient Air Guidance would no longer require "physical barriers" around an area to be excluded from the Ambient Air definition; only "effective measures" limiting public access are required. Air emissions permits and modeling regulate emissions to "ambient air". The Ambient Air Guidance seeks to clarify areas at a source covered by the term. The current policy states the atmosphere is ambient air unless (1) the area is controlled by the source, and (2) "access [is] precluded" by physical barriers. The revision to Ambient Air Guidance is consistent with protection of air quality.

First, technology makes the need for physical barriers, such as a fence, obsolete. A source may deter access by security, cameras, or other remote monitoring devices such as flying drones. These provide sufficient time to react and remove trespassers from the controlled areas. Removing the need for physical barriers more property places the decision on proper "access measures" in the hands of technical experts best suited to regulate and control access to a source area.

Second, objectives of the Ambient Air Guidance are not adversely effected by making physical barriers optional:

1. Protection for human health and the environment will not be limited, because new

technological “measures” are effective;

2. State and EPA must ensure under the new Ambient Air Guidance any measures approved consider how “likely” it would be for persons “to trespass upon or otherwise have access” to the controlled areas, ensuring protections for human health and the environment under the Clean Air Act; and

3. The “measures” chosen by a source must include “legal authority to preclude access”, which ensures any violation of the measures is enforceable by the permittee or EPA.

2. Applicability to States

The draft Ambient Air Guidance is deficient in one way. It does not directly apply to States. Accordingly, SCMA requests the Ambient Air Guidance be adopted into Federal regulations or otherwise become enforceable on delegated State programs.

State programs must be at least as stringent as Federal regulations. EPA’s policies interpreting Federal regulations like Ambient Air Guidance are given deference in most cases. The Ambient Air Guidance is not enforceable in any state by its own terms, however, since it merely prescribes EPA’s interpretation of the definition of “ambient air” in Federal regulations.

The lack of consistent interpretation in States creates a bar to commerce in the various States. It allows a State to be more stringent on the scope of the term “ambient air” and as a result, deter business expansion. Conversely, other States may embrace the draft Ambient Air Guidance and become more “business friendly”. This inevitable result erects a barrier to commerce in the several states in violation of the Commerce Clause, United States Constitution.

SOUTH CAROLINA MANUFACTURERS ALLIANCE

RECOMMENDED ACTION

SCMA members and associates support EPA's effort to clarify the definition of ambient air in Clean Air Act regulations. Accordingly, SCMA recommends EPA adopt as written in the Ambient Air Guidance. It is also requested EPA prevent the Ambient Air Guidance from supporting barriers to commence and enforce the definition in all states through a regulatory amendment or other mechanism.

Sincerely,

JFW

John F. Wall IV
General Counsel & VP of Gov't Relations
South Carolina Manufacturers Alliance

Ambient Air Comments: Record No. 10

Submitted on 12/17/2018 4:37PM
Submitted values are:

First Name: Thomas
Last Name: Ferns
Organization: U. S. Department of Energy Email address: thomas.ferns@rl.doe.gov
Comment:
As the Air Permit lead for the Hanford Site I support the EPA Draft Policy that replaces, “a fence or other physical barriers” with “measures, which may include physical barriers, that are effective in deterring or precluding access to the land by the general public.” DOE Hanford agrees with the EPA's proposed revision that accepts that institutional and technology based controls have evolved to a state where measures other than fencing or other physical barriers are available as an effective deterrent to public access. Traditional fencing has both ecological and cultural issues that should be avoided where feasible. Here at Hanford, the build up of tumble weeds and tumble mustard on chain-link or 3 strand wire fences after wind events causes fence strain during the wind events, presents barriers to wildlife, and creates fire hazards. Trying to maintain fencing in active sand dunes is an operational challenge and interferes with the natural movement of the dunes, which are protected under the Hanford Reach National Monument Proclamation.

DOE agrees with EPA's examples presented besides traditional fencing that include the following:
Video surveillance and monitoring,
Clear signage,
Routine security patrols,
Drones,
Potential future technologies.

Ambient Air Comments: Record No. 11

Submitted on 12/18/2018 11:08AM
Submitted values are:

First Name: Andy
Last Name: O'Hare
Organization: The Fertilizer Institute
Email address: aohare@tfi.org
Comment:
December 18, 2018

Environmental Protection Agency
Office of Air and Radiation
200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Request for Comments on Revised Policy on Exclusions from "Ambient Air"

Dear Sir/Madam:

I am pleased to share with you the views of The Fertilizer Institute (TFI) on the revised policy on exclusions from "Ambient Air." The agency released the revised policy for comment in November 2018. Many TFI members operate manufacturing and other facilities that are subject to the National Ambient Air Quality Standards (NAAQS); consequently, the association is very interested in how the agency defines "ambient air" for the purposes of implementing the NAAQS standards. TFI agrees with EPA that there are ways to modify the definition of "ambient air" to allow for public access restrictions that do not necessitate the use of physical barriers.

TFI represents fertilizer manufacturers, transporters, wholesalers, brokers and retailers. Our members provide nutrients that are responsible for nearly half of a crop's yield, helping to ensure a stable and reliable food supply. The fertilizer industry supports nearly 500,000 American jobs and has an economic impact of over $150 billion annually.

Many TFI members operate facilities that have a large geographic foot print.
These include manufacturing, mining and distribution facilities. Some may cover tens of square miles, thereby making it very difficult, if not impossible, to encompass with physical barriers. Pursuant to guidance issued by EPA in 1980, the owner/operator of a facility subject to the NAAQS has been exempt from requirements imposed by those standards only for the ambient air owned and controlled by the facility, provided access to the public is "precluded by a fence or other physical barriers."

As EPA explains in the revised guidance, facility surveillance technology has evolved appreciably over the ensuing decades and physical barriers, such as fences, may no longer be necessary for a facility owner/operator to secure the perimeter of a facility subject to NAAQS.

Accordingly, EPA is proposing to amend the ambient air policy, consistent with the regulatory definition of ambient air, to "exclude the atmosphere over land owned or controlled by the stational source, where the owner/operator of the sources employs measures, which may include physical barriers, that

are effective in deterring or precluding access to the land by the general public." The operative word is "measures," which will provide facility owners and operators with the necessary flexibility to consider various means, beyond physical barriers, to secure their perimeter.

TFI supports the above change to the ambient air policy and believes that it will facilitate more practical outcomes on a facility-by-facility basis by states challenged with assessing the most practical means of limiting public access to facilities subject to NAAQS standards.

Thank you for the opportunity to share the perspectives of TFI on this matter. Please do not hesitate to reach out with any questions. I may be reached at (202) 515-2704 or aohare@tfi.org.

Sincerely,

Andrew T. O'Hare
Vice President, Public Policy

SOUTH CAROLINA CHAMBER OF COMMERCE

December 5, 2018

United States Environmental Protection Agency
Ambient_Air_Guidance@epa.govDecember 5, 2018December 5, 2018

Subject: Comments on draft guidance titled, *Revised Policy on Exclusions from "Ambient Air"*

To Whom It May Concern:

In November 2018, the United States Environmental Protection Agency (EPA) requested comments from interested stakeholders on draft guidance titled, Revised Policy on *Exclusions from "Ambient Air"*. In this draft guidance, the EPA is revising a 1980 policy on the scope of "ambient air" under the Clean Air Act and EPA's regulations.

The South Carolina Chamber of Commerce (SC Chamber) supports EPA's common-sense guidance on determining what is excluded from Ambient Air for the purposes of air dispersion modeling. SC Chamber's Member companies may wish to continue to use fencing or other physical barriers. Other Member companies may wish to implement other measures such as video surveillance and monitoring, clear signage, routine security patrols, drones, and other future technologies that allow for detection of incursion by the public and facility response to prevent the public from being present for a significant time period. We support the flexibility in EPA's draft guidance.

If you have any questions or need more information, please contact Bob Mahoney at (803) 255-2639.

Sincerely,

Ted Pitts
President and CEO

cc: Tommy Lavender, Chair, Environmental Technical Committee
Bob Mahoney, Chair, ETC Air Subcommittee

1301 Gervais Street
Suite 1100
Columbia, SC 29201

(803) 799-4601

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(803) 779-6043

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Ambient Air Comments: Record No. 13

Submitted on 12/19/2018 12:11PM
Submitted values are:

First Name: Joy
Last Name: Wiecks
Organization: Fond du Lac Band of Lake Superior Chippewa
Comment:
December 19, 2018

U.S. Environmental Protection Agency
EPA Docket Center (EPA/DC)
Mail Code 28221T
1200 Pennsylvania Ave, NW
Washington, DC 20460

Subject: Proposed Revised Policy On Exclusions from "Ambient Air"

Introduction
The Fond du Lac Band (the Band) is pleased to submit these comments regarding the U.S. Environmental Protection Agency's (EPA) Draft Guidance: Revised Policy on Exclusions from "Ambient Air" hereafter referred to as the "proposal".

The Band is a federally recognized tribe with a Reservation located in northeastern Minnesota. The Band retains hunting, fishing and gathering rights on more than 8 million acres of territory in Northeastern Minnesota ceded to the United States government under the Treaties of 1837 and 1854. The Band also exercises Treaty Rights in the 1837 and 1842 Ceded Territories of Wisconsin and Michigan. The Band has Treatment as an Affected State for air related activities that take place near the Reservation and/or other tribal lands.

In draft guidance dated November, 2018, the EPA seeks comment on a relaxation of the definition of "ambient air", as it relates to air quality modeling for permitted sources. Due to the recent tightening of health-based National Ambient Air Quality Standards (NAAQS), certain stakeholders have argued that the application of the EPA's current ambient air policy is overly restrictive and that technological advances in surveillance and monitoring should be able to (in some cases) take the place of physical barriers, such as fences or rugged terrain. Currently, physical barriers are preferred in order to make these properties inaccessable to the general public. The Band objects to this proposal for the following reasons:

Significance of Changes and Lack of Adequate Analysis The Clean Air Act (CAA) defines "ambient air" in 40 CFR Section 50.1(e) as "the atmosphere, external to buildings, to which the general public has access." Implementation of the CAA relies heavily on this definition –
40 CFR Parts 60 (New Source Performance Standards), 51 (Review of New Sources and Modifications), and Subpart I (New Source Review and Prevention of Significant Deterioration) all use the term "ambient air". Given the fundamental importance of this term and the nearly forty years of consistent

interpretation by the EPA, the Band believes the EPA is acting imprudently by seeking this change in policy in an incautious, inadequate, and hurried manner.

Potential Impacts

The Band anticipates that this proposal would allow sources of air pollution to expand the area around each source that is exempted from "ambient air", thus potentially allowing ambient air quality standards to be improperly exceeded in these areas. We are concerned about the effect this may have on both the general population and on Band members, many of whom continue to lead subsistence lifestyles that involve the exercise of treaty rights in various landscapes. As we will discuss in the following sections, the analysis for this change is wholly inadequate and says nothing about what increases in pollution may be expected due to this change.

Necessity

The EPA has not adequately demonstrated the need for this proposed change because no actual analysis was performed, except for the mention that due to tightening of the NAAQS over time, "certain stakeholders" would like to see a change in order to make it easier for facilities to show modeled compliance with the NAAQS. The short analysis that was provided is biased, as it doesn't offer any argument for retaining the current interpretation of "ambient air". One benefit of retaining the current interpretation is that the rule is currently easy to understand and interpret – namely, a physical barrier, such as a fence, is needed to ensure that the general public is not exposed to ambient air that doesn't meet the NAAQS.

Further, sources needing an exemption to the fencing requirement due to unusual circumstances can already receive one under the EPA's existing interpretation. REDOIL v. EPA. 716 F.3d 1155 (9th Cir. 2012) is an example of a case where the EPA determined that terrain was sufficient to preclude public access. This case involved setting ambient air boundaries for an offshore oil and gas drillship. The EPA decided to use the Coast Guard's 500 meter effective safety zone around the ship as a surrogate for physical fencing. The Band believes this was a reasonable and common sense solution for a unique situation and could be emulated in comparable circumstances.

Procedure

The EPA has not adequately explained why this change is needed, nor has it even attempted to analyze the potential consequences of the proposal. A technical, staff level analysis should have been performed to study the potential impacts on the environment and the costs/benefits of this policy decision. Due to this lack of analysis, and also to a lack of outreach, the public is almost completely uninformed about the implications of this proposal.

Health and Environmental Impacts

It is impossible to comment on the specifics of this proposal because there has been no analysis of what health or environmental impacts may result from its promulgation. It is irresponsible to issue such a proposal without the proper analysis on human health and the environment.

Lack of Outreach

As stated above, there has been little to no outreach or consultation on this issue. Requesting comments without giving information on what results may be expected is useless, as comment writers are left to speculate on exactly what scenarios they are being asked to comment on.

Specific Relevant Case

The Band recently commented on the use of such a relaxation in the ambient air modeling performed for a proposed source in Minnesota, the NorthMet copper/nickel mine proposed in the northern part of the state. The source proposed this relaxed approach due to high existing levels of PM2.5 and PM10.

The Band strongly disagreed with this approach in our comments on the draft air quality permit. There are a number of taconite mines already operating in the area and current levels of these pollutants have been shown to be greater than 90% of the NAAQS. Nevertheless, the NorthMet modeling varied from standard modeling protocols in a number of ways, including using a more relaxed definition of "ambient air". Thus, the Band believes that if facilities are having trouble demonstrating modeled compliance, the blame may not lie with "inflexible or outdated" aspects of policy, as stated in the proposal, but because ambient levels are already too high to accommodate additional sources of pollution.

Inadequate Measures

The proposal mentions other ways by which a facility can deter or preclude public access, such as through security patrols, drones, or remote surveillance cameras. We believe that these are infeasible, particularly at larger sources that cover hundreds of acres, such as at a mine site. No Trespassing signs can be easily ignored. Surveillance cameras could not adequately cover large areas. Drones can only be used intermittently and only in daylight hours and in acceptable weather conditions. Security patrols have all of the limitations inherent to cameras or drones. Further, most facilities are unlikely to want to devote precious financial resources to 24/7 coverage using expensive security guards. Drones are also expensive to operate, as operators must be certified by the FAA.

Weakened Language

The language proposed by the EPA would serve to greatly weaken the definition of "ambient air". The EPA proposes that it is appropriate to exclude "the atmosphere over land owned or controlled by the stationary source, where the owner or operator of the source employs measures, which may include physical barriers, that are effective in deterring or precluding access to the land by the general public." By changing physical barriers to something that "may be included" rather than as the required, or even preferred, this proposal lets facilities know that physical barriers do not need to be considered very seriously or given top priority.

Conclusion and Recommendations

In conclusion, the Band opposes the promulgation of this proposal for the reasons outlined above. We recommend that the EPA instead retain its current interpretation of "ambient air".

Thank you for this opportunity to provide comments. For further discussion, please call me at 218-878-7108.

Sincerely,

Joy Wiecks
Air Coordinator
Fond du Lac Band

c.c. Sean Copeland, Fond du Lac Legal Counsel
Ben Giwojna, EPA Region 5

Ambient Air Comment: Record No. 14

Submitted on 12/20/2018 12:03AM
Submitted values are:

First Name: Thomas
Last Name: Allen
Organization: Cook Allen Engineers and Surveyors
Comment: Cook Allen Engineers and Surveyors fully support the efforts of the EPA concerning the proposed ambient air rule.

Ute Mountain Ute Tribe

Environmental Programs Department
P.O. Box 448
Towaoc, Colorado 81334-0448

(970) 564-5430

December 20, 2018

US Environmental Protection Agency
Office of Air and Radiation
Mail Code 6101A
1200 Pennsylvania Avenue NW
Washington, DC 20460

RE: Revised Policy on Exclusions from "Ambient Air"

To Whom It May Concern:

Ute Mountain Ute Tribe Environmental Department is pleased to submit these comments on EPA's draft guidance titled "Revised Policy on Exclusion from Ambient Air."

The Ute Mountain Ute Indian Reservation is located mostly in extreme southwestern Colorado, with portions extending in southeastern Utah and northwestern New Mexico. The Reservation is approximately 933 square miles in total area of trust land. It is the homeland for the Weeminuche Band whose population is 2,100 members. The tribal lands expand three states and contain unique prehistoric archeological sites. The Tribal seat, where most of the population lives, is located at Towaoc, Colorado, located at the base of the Sleeping Ute Mountain, a culturally significant formation, in Montezuma County.

EPA has recently announced that it plans to revisit its longstanding interpretation of "ambient air," defined in 40 C.F.R. § 50.1(e) as "the atmosphere, external to buildings, to which the general public has access." This regulatory definition, and EPA's interpretation of the term, is of key importance in implementing the Clean Air Act (CAA) because the statute, while using the term "ambient air" as part of the foundations of U.S. air regulation, provides no definition for the term. The core purpose of the CAA is to prevent pollution of ambient air to protect the public health and

welfare, and one of the fundamental strategies the Act uses to reach this goal is the mandate to achieve and maintain National Ambient Air Quality Standards (NAAQS). In turn, those ambient air standards dictate State and Tribal Implementation Plan provisions, and are implemented through most of the major programs under the Act. *See, e.g.*, 40 C.F.R part 60 (New Source Performance Standards repeatedly use the term ambient air in setting limitations for all source categories); 40 C.F.R. part 51, subpart I (new source review and prevention of significant deterioration programs' purpose is to attain and maintain the ambient air standards). Considering the fundamental importance of the term and the nearly forty years of consistent interpretation by EPA, we have a number of concerns regarding the agency's proposed change in policy.

First, we wish to share certain substantive concerns, including the potential negative impacts to health and welfare that would result from this reinterpretation in and near Indian Country. Second, we believe the process EPA has followed here is entirely insufficient to inform the agency and the public regarding this major change in policy and its impacts on the people and the environment. Based on these concerns, we oppose this revision to policy and ask that EPA retain its longstanding approach. In the alternative, should the agency choose to move forward, we ask that the agency perform the analysis needed to support its decision-making process, and postpone final action until EPA, the Tribes, and the public have the opportunity to consider fully the impacts of this action.

Substantive Policy Issues

Ute Mountain Ute Tribe Environmental Department anticipates that this proposal would allow sources of air pollution to expand the amount of area around each source that is exempted from ambient air, thus limiting the detection of the sources' air pollution further and bypassing violations of the NAAQS that the source may have caused under the previous policy. We are concerned about the effect this potential increase in air pollution will have on the health and welfare of indigenous peoples throughout the United States. In addition, as discussed in greater depth regarding our procedural concerns, because no data is available to inform the effects we can expect here, this increase in pollution and the scale of its effects is currently unquantifiable.

We expect the removal of the fencing requirement from EPA's understanding of ambient air to have disproportionate impacts on Tribes. Native Americans use the land in traditional ways, including pastoralism, to a greater extent and with greater duration than the average American. Additionally, air quality impacts extend to hunting, fishing, and gathering rights of Tribes in Ceded Territories, lands that Tribes transferred to the federal government in exchange for off-reservation rights by a treaty agreement. We expect this proposed policy will negatively affect the treaty rights of Tribes to continue to sustain themselves by accessing resources on ceded lands across the United States. For many Tribes, traveling over land or pasturing herds across open land is a way of life, and we anticipate the greater exceptions for "ambient air" under this revised policy would cause Native Americans to experience greater exposure to pollution than most Americans.

We also question the necessity of this action. Reversing longstanding policy should only be done for good reason and after careful analysis, and in this instance there appears to be little important policy gain from the change, rather certain clear detriments. Removing the fencing requirement would eliminate the existing bright line rule, which is far easier to implement than the nebulous and *ad hoc* considerations EPA and industry will need to engage in under the revised policy. Fences are clear and simple markers of boundaries, and they provide a common sense and easily verifiable border for determining what is and is not "ambient air."

Further, Ute Mountain Ute Tribe Environmental Department notes that should sources need an exception to the fencing requirement due to unusual circumstances, they may already receive one under EPA's existing interpretation. The agency has applied a rule of reason and, for example, granted exceptions where terrain makes fencing difficult but effectively excludes the general public. *See* EPA, AMBIENT AIR REVIEW TEAM OVERVIEW at 11, http://www.cleanairinfo.com/regionalstatelocalmodelingworkshop/archive/2017/Presentations/2-6_2017_RSL-AART.pdf (case study of Audubon Material (a.k.a. Central Plains Cement) ambient air analysis in which EPA determined terrain was sufficient to preclude access). EPA points out this flexibility in the revised policy's discussion of *REDOIL v. EPA*. 716 F.3d 1155 (9th Cir. 2012). There, the agency was confronted with how to set ambient air boundaries for an offshore oil and gas drillship, and chose to use the Coast Guard's 500-meter effective safety zone around the ship at sea as a substitute for fencing, a common sense decision that was upheld by the Ninth Circuit. *Id.* at 1159, 1165. *REDOIL* demonstrates the flexibility to address unusual circumstances in EPA's existing understanding of "ambient air." While EPA uses *REDOIL* to support removing the fencing exception, Ute Mountain Ute Tribe Environmental Department reads it as support for retaining the fencing requirement in addition to the existing flexibility EPA already applies. Fencing isn't practical over water; the necessity of an exception in that specific case does not justify altering the rule for every other instance.

In addition to the loss of a bright line rule and the accompanying implementation costs, we note that infrastructure costs may also follow on this policy change. If the agency or sources have set up monitoring equipment at the edge of the current ambient air for the source, that equipment, nationwide, must likely be moved and recalibrated. Ute Mountain Ute Tribe Environmental Department requests an assessment of this matter and analysis of costs.

Procedural Concerns

Our substantive concerns here are aggravated by the lack of information and analysis available on this matter. EPA has released only a brief policy and legal document with no technical, staff-level analysis of its impacts on the environment or on the costs and benefits of this policy decision. While we acknowledge that this agency action is not a regulation, which would trigger sufficient environmental review and Executive Order 12866 costs and benefits analysis, this policy revision nevertheless will alter how air emissions and violations of the NAAQS are measured across the nation. We believe EPA's proposed revision amounts to a major agency action with a significant

effect on the human environment, and therefore EPA should engage in some form of environmental analysis of the issue.

While 15 U.S.C. § 793(c) exempts actions taken under the CAA from National Environmental Policy Act (NEPA) analysis, Congress did so because the typical CAA action involves considerable environmental analysis mandated by the statute, and thus the functional equivalent of NEPA is achieved by the agency's work. There was no such analysis at all in this case; the agency is moving forward blindly, and the public, including the Ute Mountain Ute Tribe, are almost completely uninformed about the implications of this action. At least some environmental analysis is called for here, and the agency should conduct this work to inform its decision and the public appropriately.

Also, considering the vast reach of the new policy, and the cost and benefit concerns we raise above, an analysis of the cost and benefits of this rule is necessary and we request that EPA perform that assessment.

Conclusion

EPA's current approach is not broken, and we see no need for the agency to provide a fix. We believe that EPA's longstanding approach should be maintained, and we strongly oppose EPA's proposed policy change.

Fencing is a reliable, clear way to ensure that the ambient air exception applies reasonably to every site. Ute Mountain Ute Tribe Environmental Department acknowledges that fencing was never a perfect solution to the question of how much atmosphere a source should be allowed to use to dilute its emissions, but it was a sensible solution to the issue. This proposed policy revision is seeking a solution without a problem. We therefore oppose EPA's proposed action and request that the agency maintain the longstanding interpretation without changes.

In the alternative, if EPA chooses to move forward with this policymaking process, we ask that the agency take a careful, measured look at the impacts of its decision and at what measures are consistent with the Act's language and purpose: to protect the public health and welfare by achieving and maintaining clean ambient air. To achieve this, the agency should perform the environmental analysis that would be required under the Clean Air Act for a rulemaking procedure, and the social costs and economic analysis that would be performed in a Regulatory Impact Analysis. This standard analytical approach to issues of national import is needed to address this significant policy change. The agency should then release this information in a second period of

public review and comment to inform the agency, Ute Mountain Ute Tribe, and the general public regarding the impacts of this action.[1]

In closing, the current interpretation of ambient air is based on a successful 40-year precedent and clear implementation, and we therefore vehemently oppose the finalization of this policy.

Ute Mountain Ute Tribe Environmental Department appreciates this opportunity to comment on the draft "Revised Policy on Exclusion from Ambient Air."

If you have any questions or seek clarification from the Ute Mountain Ute Tribe, please contact Janice Archuleta. Ute Mountain Ute Environmental Programs Air Quality Program Manager.

Signed,

Janice Archuleta

Environmental Programs
Air Quality Program Manager

[1] We also note that the two key policy documents, which EPA relies on here, the 1980 letter from Administrator Costle and the 2007 Stephen Page memorandum, were not provided with the revised policy. We request that EPA make these documents readily available to the general public in its second round of public review.

Sac and Fox Nation

920883 S. Hwy. 99 Bldg. A • Stroud, OK 74079

Principal Chief KAY RHOADS
Second Chief AUDREY R. LEE
Secretary JACKLYN K. KING
Treasurer JARED A. KING
Committee Member ROBERT E. WILLIAMSON

December 19, 2018

US Environmental Protection Agency
Office of Air and Radiation
Mail Code 6101A
1200 Pennsylvania Avenue NW
Washington, DC 20460

RE: Revised Policy on Exclusions from "Ambient Air"

To Whom It May Concern:

On behalf of the Sac and Fox Nation, I am pleased to submit these comments on EPA's draft guidance titled "Revised Policy on Exclusion from Ambient Air."

The Sac and Fox Nation is a Federally Recognized tribe located in Central Oklahoma within Congressional Districts 003 and 005, including portions of Lincoln, Potawatomi, and Payne counties with over 4,000 enrolled tribal members. The Cushing Terminal and Oil Storage Facility is located within the heart of Sac and Fox Nation. This is the largest oil storage facility in North America and Cushing has been dubbed the "Pipeline Crossroads of the World". Within only approximately 1,000 feet of this storage facility there is Cushing's Lower Elementary School where children in Pre-Kindergarten, Kindergarten, and First Grade learn and play each day during the school year. It is imperative the safety of these children is placed above EPA's evolving mission to increase savings and profit margins of industry in exchange for the exploitation of life safety and natural resources. This is only a single example, many more exist across Sac and Fox Nation jurisdiction and the country as a whole. National Response Center Incident Reports #1232055 and #123075 of December, 2018 both list the Air/Atmosphere as the "Affected Medium" and Crude/Vapors as the "Released Materials". These are only two of approximately eighty Incident Reports Sac and Fox Nation's Office of Environmental Services has on record that specify Vapors and the release material since February, 2014 when incident tracking was improved. Crude/Vapors were released as part of the vast majority of other reportable releases, although they are not listed/recorded under "Released Material". This multitude of releases into the ambient air should be considered by EPA to accurately characterize and communicate the current injury and threat of injury to ambient air as well as how this proposed measure will

exacerbate those injuries and threats of injury. Serious bodily injury has also resulted from human induced earthquakes caused, in part, by lack of sufficient regulations of oil and gas industry fracking and waste water injection activities. EPA will be making a similar mistake by following the road map to continue to reduce, repeal, and rescind these regulations until individuals become ill, injured, or worse deceased. This story has played out time and time again. EPA states it, "is returning to its core mission of protecting human health and the environment. We are committing to providing clean and safe air, water, and land for all Americans." [EPA.gov 7/6/2018] This directly contradicts the repeated references of the savings, reduced regulatory burden, certainty, etc. intended for industry. EPA is so bold as to have even touted these anti-mission, or at least questionable, core outcomes in recent press releases for proposed EPA actions. Nowhere in EPA's mission statement does it include providing industry "significant cost savings...help sustain economic growth, and reduce barriers to business development." [EPA Press Office, 12/11/2018] We strongly encourage EPA staff to adhere to its core mission that it reaffirmed July 6, 2018 and apply their efforts to protect human safety and the environmental above optimizing profits.

EPA has recently announced that it plans to revisit its longstanding interpretation of "ambient air," defined in 40 C.F.R. § 50.1(e) as "the atmosphere, external to buildings, to which the general public has access." This regulatory definition, and EPA's interpretation of the term, is of key importance in implementing the Clean Air Act (CAA) because the statute, while using the term "ambient air" as part of the foundations of U.S. air regulation, provides no definition for the term. The core purpose of the CAA is to prevent pollution of ambient air to protect the public health and welfare, and one of the fundamental strategies the Act uses to reach this goal is the mandate to achieve and maintain National Ambient Air Quality Standards (NAAQS). In turn, those ambient air standards dictate State and Tribal Implementation Plan provisions, and are implemented through most of the major programs under the Act. *See, e.g.*, 40 C.F.R part 60 (New Source Performance Standards repeatedly use the term ambient air in setting limitations for all source categories); 40 C.F.R. part 51, subpart I (new source review and prevention of significant deterioration programs' purpose is to attain and maintain the ambient air standards). Considering the fundamental importance of the term and the nearly forty years of consistent interpretation by EPA, we have a number of concerns regarding the agency's proposed change in policy.

First, we wish to share certain substantive concerns, including the potential negative impacts to health and welfare that would result from this reinterpretation in and near Indian Country. Second, we believe the process EPA has followed here is entirely insufficient to inform the agency and the public regarding this major change in policy and its impacts on the people and the environment. Based on these concerns, we oppose this revision to policy and ask that EPA retain its longstanding approach. In the alternative, should the agency choose to move forward, we ask that the agency perform the analysis needed to support its decision-making process, and postpone final action until EPA, the Tribes, and the public have the opportunity to consider fully the impacts of this action.

Substantive Policy Issues

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potential increase in air pollution will have on the health and welfare of indigenous peoples throughout the United States. In addition, as discussed in greater depth regarding our procedural concerns, because no data is available to inform the effects we can expect here, this increase in pollution and the scale of its effects is currently unquantifiable.

We expect the removal of the fencing requirement from EPA's understanding of ambient air to have disproportionate impacts on Tribes. Native Americans use the land in traditional ways, including pastoralism, to a greater extent and with greater duration than the average American. Additionally, air quality impacts extend to hunting, fishing, and gathering rights of Tribes in Ceded Territories, lands that Tribes transferred to the federal government in exchange for off-reservation rights by a treaty agreement. We expect this proposed policy will negatively affect the treaty rights of Tribes to continue to sustain themselves by accessing resources on ceded lands across the United States. For many Tribes, traveling over land or pasturing herds across open land is a way of life, and we anticipate the greater exceptions for "ambient air" under this revised policy would cause Native Americans to experience greater exposure to pollution than most Americans.

We also question the necessity of this action. Reversing longstanding policy should only be done for good reason and after careful analysis, and in this instance there appears to be little important policy gain from the change, rather certain clear detriments. Removing the fencing requirement would eliminate the existing bright line rule, which is far easier to implement than the nebulous and *ad hoc* considerations EPA and industry will need to engage in under the revised policy. Fences are clear and simple markers of boundaries, and they provide a common sense and easily verifiable border for determining what is and is not "ambient air."
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In addition to the loss of a bright line rule and the accompanying implementation costs, we note that infrastructure costs may also follow on this policy change. If the agency or sources have set up monitoring equipment at the edge of the current ambient air for the source, that equipment,

nationwide, must likely be moved and recalibrated. Sac and Fox Nation requests an assessment of this matter and analysis of costs.

Procedural Concerns

Our substantive concerns here are aggravated by the lack of information and analysis available on this matter. EPA has released only a brief policy and legal document with no technical, staff-level analysis of its impacts on the environment or on the costs and benefits of this policy decision. While we acknowledge that this agency action is not a regulation, which would trigger sufficient environmental review and Executive Order 12866 costs and benefits analysis, this policy revision nevertheless will alter how air emissions and violations of the NAAQS are measured across the nation. We believe EPA's proposed revision amounts to a major agency action with a significant effect on the human environment, and therefore EPA should engage in some form of environmental analysis of the issue.

While 15 U.S.C. § 793(c) exempts actions taken under the CAA from National Environmental Policy Act (NEPA) analysis, Congress did so because the typical CAA action involves considerable environmental analysis mandated by the statute, and thus the functional equivalent of NEPA is achieved by the agency's work. There was no such analysis at all in this case; the agency is moving forward blindly, and the public, including Sac and Fox Nation, are almost completely uninformed about the implications of this action. At least some environmental analysis is called for here, and the agency should conduct this work to inform its decision and the public appropriately.

Also, considering the vast reach of the new policy, and the cost and benefit concerns we raise above, an analysis of the cost and benefits of this rule is necessary and we request that EPA perform that assessment.

Conclusion

EPA's current approach is not broken, and we see no need for the agency to provide a fix. We believe that EPA's longstanding approach should be maintained, and we strongly oppose EPA's proposed policy change.

Fencing is a reliable, clear way to ensure that the ambient air exception applies reasonably to every site. Sac and Fox Nation acknowledges that fencing was never a perfect solution to the question of how much atmosphere a source should be allowed to use to dilute its emissions, but it was a sensible solution to the issue. This proposed policy revision is seeking a solution without a problem. We therefore oppose EPA's proposed action and request that the agency maintain the longstanding interpretation without changes.

In the alternative, if EPA chooses to move forward with this policymaking process, we ask that the agency take a careful, measured look at the impacts of its decision and at what measures are consistent with the Act's language and purpose: to protect the public health and welfare by achieving and maintaining clean ambient air. To achieve this, the agency should perform the environmental analysis that would be required under the Clean Air Act for a rulemaking procedure,

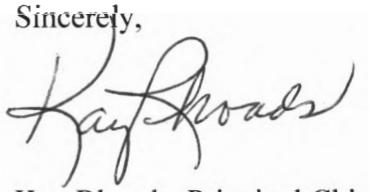
and the social costs and economic analysis that would be performed in a Regulatory Impact Analysis. This standard analytical approach to issues of national import is needed to address this significant policy change. The agency should then release this information in a second period of public review and comment to inform the agency, Sac and Fox Nation, and the general public regarding the impacts of this action.[1]

In closing, the current interpretation of ambient air is based on a successful 40-year precedent and clear implementation, and we therefore vehemently oppose the finalization of this policy.

Sac and Fox Nation appreciates this opportunity to comment on the draft "Revised Policy on Exclusion from Ambient Air."

If you have any questions or seek clarification from Sac and Fox Nation, please contact Sharon Hamblin, Chief Financial Officer, by email at sharon.hamblin@sacandfoxnation-nsn.gov or Sarah Brown, Policy Analyst, by email at sarah.brown@sacandfoxnation-nsn.gov or by phone at 918-968-3526

Sincerely,



Kay Rhoads, Principal Chief
Sac and Fox Nation

[1] We also note that the two key policy documents, which EPA relies on here, the 1980 letter from Administrator Costle and the 2007 Stephen Page memorandum, were not provided with the revised policy. While the National Tribal Air Association obtained these documents and was able to review them to inform our comments, we request that EPA make these documents readily available to the general public in its second round of public review.

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December 21, 2018

US Environmental Protection Agency
Office of Air and Radiation
Mail Code 6101A
1200 Pennsylvania Avenue NW
Washington, DC 20460

RE: Revised Policy on Exclusions from "Ambient Air"

To Whom It May Concern:

Klawock Cooperative Association, Tribe is pleased to submit these comments on EPA's draft guidance titled "Revised Policy on Exclusion from Ambient Air."

The Klawock Cooperative Association, Tribe (KCA) is a federally recognized Tribal Government pursuant to the Indian Reorganization Act (IRA) of 1936 as amended, and the Tribal Council is the governing body for the Tribe as authorized by its Constitution and By Laws in accordance with, and by authority of, the Act of Congress of June 18, 1934 (48 Stat. 984), as amended by the Acts of June 15, 1935 (49 Stat. 378), and May 1, 1936 (49 Stat. 1250). The Klawock Cooperative Association Tribal Council is a duly elected governing body of the Tribe, authorized to act by and on behalf of its tribal members. The Klawock Cooperative Association is located in the community of Klawock.

KCA's Environmental Department, assists in developing and implementing programs addressing air quality, water quality, solid waste, contaminated sites, subsistence and customary/ traditional use areas and any other environmental issues that may arise which affects the well-being of the Tribe and Tribal Members.

EPA has recently announced that it plans to revisit its longstanding interpretation of "ambient air," defined in 40 C.F.R. § 50.1(e) as "the atmosphere, external to buildings, to which the general public has access." This regulatory definition, and EPA's interpretation of the term, is of key importance in implementing the Clean Air Act (CAA) because the statute, while using the term "ambient air" as part of the foundations of U.S. air regulation, provides no definition for the term. The core purpose of the CAA is to prevent pollution of ambient air to protect the public health and welfare, and one of the fundamental strategies the Act uses to reach this goal is the mandate to achieve and maintain National Ambient Air Quality Standards (NAAQS). In turn, those ambient air standards dictate State and Tribal Implementation Plan provisions, and are implemented through most of the major programs under the Act. *See, e.g.*, 40 C.F.R part 60 (New Source Performance Standards repeatedly use the term ambient air in setting limitations for all source categories); 40 C.F.R. part 51, subpart I (new source review and prevention of significant deterioration programs' purpose is to attain and maintain the ambient air standards). Considering

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The fundamental importance of the term and the nearly forty years of consistent interpretation by EPA, we have a number of concerns regarding the agency's proposed change in policy.

First, we wish to share certain substantive concerns, including the potential negative impacts to health and welfare that would result from this reinterpretation in and near Indian Country. Second, we believe the process EPA has followed here is entirely insufficient to inform the agency and the public regarding this major change in policy and its impacts on the people and the environment. Based on these concerns, we oppose this revision to policy and ask that EPA retain its longstanding approach. In the alternative, should the agency choose to move forward, we ask that the agency perform the analysis needed to support its decision-making process, and postpone final action until EPA, the Tribes, and the public have the opportunity to consider fully the impacts of this action.

Substantive Policy Issues

Klawock Cooperative Association, Tribe anticipates that this proposal would allow sources of air pollution to expand the amount of area around each source that is exempted from ambient air, thus limiting the detection of the sources' air pollution further and bypassing violations of the NAAQS that the source may have caused under the previous policy. We are concerned about the effect this potential increase in air pollution will have on the health and welfare of indigenous peoples throughout the United States. In addition, as discussed in greater depth regarding our procedural concerns, because no data is available to inform the effects we can expect here, this increase in pollution and the scale of its effects is currently unquantifiable.

We expect the removal of the fencing requirement from EPA's understanding of ambient air to have disproportionate impacts on Tribes. Native Americans use the land in traditional ways, including pastoralism, to a greater extent and with greater duration than the average American. Additionally, air quality impacts extend to hunting, fishing, and gathering rights of Tribes in Ceded Territories, lands that Tribes transferred to the federal government in exchange for off-reservation rights by a treaty agreement. We expect this proposed policy will negatively affect the treaty rights of Tribes to continue to sustain themselves by accessing resources on ceded lands across the United States. For many Tribes, traveling over land or pasturing herds across open land is a way of life, and we anticipate the greater exceptions for "ambient air" under this revised policy would cause Native Americans to experience greater exposure to pollution than most Americans.

We also question the necessity of this action. Reversing longstanding policy should only be done for good reason and after careful analysis, and in this instance there appears to be little important policy gain from the change, rather certain clear detriments. Removing the fencing requirement would eliminate the existing bright line rule, which is far easier to implement than the nebulous and *ad hoc* considerations EPA and industry will need to engage in under the revised policy. Fences are clear and simple markers of boundaries, and they provide a common sense and easily verifiable border for determining what is and is not "ambient air."
Further, Klawock Cooperative Association, Tribe notes that should sources need an exception to the fencing requirement due to unusual circumstances, they may already receive one under EPA's

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existing interpretation. The agency has applied a rule of reason and, for example, granted exceptions where terrain makes fencing difficult but effectively excludes the general public. *See*

EPA, AMBIENT AIR REVIEW TEAM OVERVIEW at 11, http://www.cleanairinfo.com/regionalstatelocalmodelingworkshop/archive/2017/Presentations/2-6_2017_RSL-AART.pdf (case study of Audubon Material (a.k.a. Central Plains Cement) ambient air analysis in which EPA determined terrain was sufficient to preclude access). EPA points out this flexibility in the revised policy's discussion of *REDOIL v. EPA*. 716 F.3d 1155 (9th Cir. 2012). There, the agency was confronted with how to set ambient air boundaries for an offshore oil and gas drillship, and chose to use the Coast Guard's 500-meter effective safety zone around the ship at sea as a substitute for fencing, a common sense decision that was upheld by the Ninth Circuit. *Id.* at 1159, 1165. *REDOIL* demonstrates the flexibility to address unusual circumstances in EPA's existing understanding of "ambient air." While EPA uses *REDOIL* to support removing the fencing exception, Klawock Cooperative Association, Tribe reads it as support for retaining the fencing requirement in addition to the existing flexibility EPA already applies. Fencing isn't practical over water; the necessity of an exception in that specific case does not justify altering the rule for every other instance.

In addition to the loss of a bright line rule and the accompanying implementation costs, we note that infrastructure costs may also follow on this policy change. If the agency or sources have set up monitoring equipment at the edge of the current ambient air for the source, that equipment, nationwide, must likely be moved and recalibrated. Klawock Cooperative Association, Tribe requests an assessment of this matter and analysis of costs.

Procedural Concerns

Our substantive concerns here are aggravated by the lack of information and analysis available on this matter. EPA has released only a brief policy and legal document with no technical, staff-level analysis of its impacts on the environment or on the costs and benefits of this policy decision. While we acknowledge that this agency action is not a regulation, which would trigger sufficient environmental review and Executive Order 12866 costs and benefits analysis, this policy revision nevertheless will alter how air emissions and violations of the NAAQS are measured across the nation. We believe EPA's proposed revision amounts to a major agency action with a significant effect on the human environment, and therefore EPA should engage in some form of environmental analysis of the issue.

While 15 U.S.C. § 793(c) exempts actions taken under the CAA from National Environmental Policy Act (NEPA) analysis, Congress did so because the typical CAA action involves considerable environmental analysis mandated by the statute, and thus the functional equivalent of NEPA is achieved by the agency's work. There was no such analysis at all in this case; the agency is moving forward blindly, and the public, including Klawock Cooperative Association, Tribe, are almost completely uninformed about the implications of this action. At least some environmental analysis is called for here, and the agency should conduct this work to inform its decision and the public appropriately.

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Also, considering the vast reach of the new policy, and the cost and benefit concerns we raise above, an analysis of the cost and benefits of this rule is necessary and we request that EPA perform that assessment.

Conclusion

EPA's current approach is not broken, and we see no need for the agency to provide a fix. We believe that EPA's longstanding approach should be maintained, and we strongly oppose EPA's proposed policy change.

Fencing is a reliable, clear way to ensure that the ambient air exception applies reasonably to every site. Klawock Cooperative Association, Tribe acknowledges that fencing was never a perfect solution to the question of how much atmosphere a source should be allowed to use to dilute its emissions, but it was a sensible solution to the issue. This proposed policy revision is seeking a solution without a problem. We therefore oppose EPA's proposed action and request that the agency maintain the longstanding interpretation without changes.

In the alternative, if EPA chooses to move forward with this policymaking process, we ask that the agency take a careful, measured look at the impacts of its decision and at what measures are consistent with the Act's language and purpose: to protect the public health and welfare by achieving and maintaining clean ambient air. To achieve this, the agency should perform the environmental analysis that would be required under the Clean Air Act for a rulemaking procedure, and the social costs and economic analysis that would be performed in a Regulatory Impact Analysis. This standard analytical approach to issues of national import is needed to address this significant policy change. The agency should then release this information in a second period of public review and comment to inform the agency, Klawock Cooperative Association, Tribe, and the general public regarding the impacts of this action.[1]

In closing, the current interpretation of ambient air is based on a successful 40-year precedent and clear implementation, and we therefore vehemently oppose the finalization of this policy.

Klawock Cooperative Association, Tribe appreciates this opportunity to comment on the draft "Revised Policy on Exclusion from Ambient Air."

If you have any questions or seek clarification from Klawock Cooperative Association, Tribe, please contact Lawrence Armour, Tribal Administrator.

Respectfully,

Lawrence Armour,
KCA Tribal Administrator

The Klawock Cooperative Association, ("the Tribe"), is a duly constituted Indian Tribe organized pursuant to the authority of Section 16 of the Act of Congress of June 18, 1934 (48 Stat. 984), amended May, 1 1936 (49 Stat. 1250) The Klawock Cooperative Association Tribal Council is a duly elected governing body of the Tribe, authorized to act by and on the behalf of its members.

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[1] We also note that the two key policy documents, which EPA relies on here, the 1980 letter from Administrator Costle and the 2007 Stephen Page memorandum, were not provided with the revised policy. While the National Tribal Air Association obtained these documents and was able to review them to inform our comments, we request that EPA make these documents readily available to the general public in its second round of public review.

Keweenaw Bay Indian Community
Natural Resources Department

January 3, 2019

US Environmental Protection Agency
Office of Air and Radiation
Mail Code 6101A
1200 Pennsylvania Avenue NW
Washington, DC 20460

RE: Revised Policy on Exclusions from "Ambient Air"

To Whom It May Concern:

Keweenaw Bay Indian Community is pleased to submit these comments on EPA's draft guidance titled "Revised Policy on Exclusion from Ambient Air."

The Keweenaw Bay Indian Community (KBIC) is located in the Western Upper Peninsula of Michigan in a rural and pristine area. The KBIC L'Anse Reservation encompasses part of Keweenaw Bay of Lake Superior in Baraga County and is KBIC's main land base. The Reservation is composed of 59,067 acres, 17 miles of Lake Superior shoreline, 80 miles of streams and rivers, 15,000 acres of lakes, and 3,000 acres of wetlands. KBIC has land ownership in adjacent Marquette and Ontonagon Counties. Our air shed is one of the most pristine in the world and any change in policy that has the ability to affect that is of highest importance to our community. As well, we support the concerns of other tribes throughout the US regarding clean air and air standards policy.

EPA has recently announced that it plans to revisit its longstanding interpretation of "ambient air," defined in 40 C.F.R. § 50.1(e) as "the atmosphere, external to buildings, to which the general public has access." This regulatory definition, and EPA's interpretation of the term, is of key importance in implementing the Clean Air Act (CAA) because the statute, while using the term "ambient air" as part of the foundations of U.S. air regulation, provides no definition for the term. The core purpose of the CAA is to prevent pollution of ambient air to protect the public health and welfare, and one of the fundamental strategies the Act uses to reach this goal is the mandate to achieve and maintain National Ambient Air Quality Standards (NAAQS). In turn, those ambient air standards dictate State and Tribal Implementation Plan provisions, and are implemented through most of the major programs under the Act. *See, e.g.*, 40 C.F.R part 60 (New Source Performance Standards repeatedly use the term ambient air in setting limitations for all source categories); 40 C.F.R. part 51, subpart I (new source review and prevention of significant deterioration programs' purpose is to attain and maintain the ambient air standards). Considering the fundamental importance of the term and the nearly forty years of consistent interpretation by EPA, we have a number of concerns regarding the agency's proposed change in policy.

First, we wish to share certain substantive concerns, including the potential negative impacts to health and welfare that would result from this reinterpretation in and near Indian Country. Second, we believe the process EPA has followed here is entirely insufficient to inform the agency and the public regarding this major change in policy and its impacts on the people and the environment. Based on these concerns, we oppose this revision to policy and ask that EPA retain its longstanding approach.

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Fax: (906) 353-7540

In the alternative, should the agency choose to move forward, we ask that the agency perform the analysis needed to support its decision-making process, and postpone final action until EPA, the Tribes, and the public have the opportunity to consider fully the impacts of this action.

Substantive Policy Issues

KBIC anticipates that this proposal would allow sources of air pollution to expand the amount of area around each source that is exempt from ambient air, thus limiting the detection of the sources' air pollution further and bypassing violations of the NAAQS that the source may have caused under the previous policy. We are concerned about the effect this potential increase in air pollution will have on the health and welfare of indigenous peoples throughout the United States. In addition, as discussed in greater depth regarding our procedural concerns, because no data is available to inform the effects we can expect here, this increase in pollution and the scale of its effects is currently unquantifiable.

We expect the removal of the fencing requirement from EPA's understanding of ambient air to have disproportionate impacts on Tribes. Native Americans use the land in traditional ways, including pastoralism, to a greater extent and with greater duration than the average American. Additionally, air quality impacts extend to hunting, fishing, and gathering rights of Tribes in Ceded Territories, lands that Tribes transferred to the federal government in exchange for off-reservation rights by a treaty agreement. We expect this proposed policy will negatively affect the treaty rights of Tribes to continue to sustain themselves by accessing resources on ceded lands across the United States. For many Tribes, traveling over land or pasturing herds across open land is a way of life, and we anticipate the greater exceptions for "ambient air" under this revised policy would cause Native Americans to experience greater exposure to pollution than most Americans.

We also question the necessity of this action. Reversing longstanding policy should only be done for good reason and after careful analysis, and in this instance there appears to be little important policy gain from the change, rather certain clear detriments. Removing the fencing requirement would eliminate the existing bright line rule, which is far easier to implement than the nebulous and *ad hoc* considerations EPA and industry will need to engage in under the revised policy. Fences are clear and simple markers of boundaries, and they provide a common sense and easily verifiable border for determining what is and is not "ambient air."

Further, KBIC notes that should sources need an exception to the fencing requirement due to unusual circumstances, they may already receive one under EPA's existing interpretation. The agency has applied a rule of reason and, for example, granted exceptions where terrain makes fencing difficult but effectively excludes the general public. See EPA, Ambient Air Review Team Overview at the website listed below: http://www.cleanairinfo.com/regionalstatelocalmodelingworkshop/archive/2017/Presentations/2-6_2017_RSL-AART.pdf (case study of Audubon Material (a.k.a. Central Plains Cement) ambient air analysis in which EPA determined terrain was sufficient to preclude access). EPA points out this flexibility in the revised policy's discussion of *REDOIL v. EPA*. 716 F.3d 1155 (9th Cir. 2012). There, the agency was confronted with how to set ambient air boundaries for an offshore oil and gas drillship, and chose to use the Coast Guard's 500-meter effective safety zone around the ship at sea as a substitute for fencing, a common sense decision that was upheld by the Ninth Circuit. *Id.* at 1159, 1165. *REDOIL* demonstrates the flexibility to address unusual circumstances in EPA's existing understanding of "ambient air." While EPA uses *REDOIL* to support removing the fencing exception, KBIC reads it as support for retaining the fencing requirement in addition to the existing flexibility EPA already applies. Fencing isn't practical over water; the necessity of an exception in that specific case does not justify altering the rule for every other instance.

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equipment at the edge of the current ambient air for the source, that equipment, nationwide, must likely be moved and recalibrated. KBIC requests an assessment of this matter and analysis of costs.

Procedural Concerns

Our substantive concerns here are aggravated by the lack of information and analysis available on this matter. EPA has released only a brief policy and legal document with no technical, staff-level analysis of its impacts on the environment or on the costs and benefits of this policy decision. While we acknowledge that this agency action is not a regulation, which would trigger sufficient environmental review and Executive Order 12866 costs and benefits analysis, this policy revision nevertheless will alter how air emissions and violations of the NAAQS are measured across the nation. We believe EPA's proposed revision amounts to a major agency action with a significant effect on the human environment, and therefore EPA should engage in some form of environmental analysis of the issue.

While 15 U.S.C. § 793(c) exempts actions taken under the CAA from National Environmental Policy Act (NEPA) analysis, Congress did so because the typical CAA action involves considerable environmental analysis mandated by the statute, and thus the functional equivalent of NEPA is achieved by the agency's work. There was no such analysis at all in this case; the agency is moving forward blindly, and the public, including KBIC, are almost completely uninformed about the implications of this action. At least some environmental analysis is called for here, and the agency should conduct this work to inform its decision and the public appropriately. Also, considering the vast reach of the new policy, and the cost and benefit concerns we raise above, an analysis of the cost and benefits of this rule is necessary and we request that EPA perform that assessment.

Conclusion

EPA's current approach is not broken, and we see no need for the agency to provide a fix. We believe that EPA's longstanding approach should be maintained, and we strongly oppose EPA's proposed policy change.

Fencing is a reliable, clear way to ensure that the ambient air exception applies reasonably to every site. KBIC acknowledges that fencing was never a perfect solution to the question of how much atmosphere a source should be allowed to use to dilute its emissions, but it was a sensible solution to the issue. This proposed policy revision is seeking a solution without a problem. We therefore oppose EPA's proposed action and request that the agency maintain the longstanding interpretation without changes.

In the alternative, if EPA chooses to move forward with this policymaking process, we ask that the agency take a careful, measured look at the impacts of its decision and at what measures are consistent with the Act's language and purpose: to protect the public health and welfare by achieving and maintaining clean ambient air. To achieve this, the agency should perform the environmental analysis that would be required under the Clean Air Act for a rulemaking procedure, and the social costs and economic analysis that would be performed in a Regulatory Impact Analysis. This standard analytical approach to issues of national import is needed to address this significant policy change. The agency should then release this information in a second period of public review and comment to inform the agency, KBIC, and the general public regarding the impacts of this action.[1]

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[1]We also note that the two key policy documents, which EPA relies on here, the 1980 letter from Administrator Costle and the 2007 Stephen Page memorandum, were not provided with the revised policy. While the National Tribal Air Association obtained these documents and was able to review them to inform our comments, we request that EPA make these documents readily available to the general public in its second round of public review.

In closing, the current interpretation of ambient air is based on a successful 40-year precedent and clear implementation, and we therefore vehemently oppose the finalization of this policy.

Keweenaw Bay Indian Community appreciates this opportunity to comment on the draft "Revised Policy on Exclusion from Ambient Air." If you have any questions or seek clarification from Keweenaw Bay Indian Community, please contact myself or air program staff, Jane Kahkonen.

Sincerely,

Evelyn Ravindran, KBIC Natural Resources Director
Keweenaw Bay Indian Community

cc. Warren C. Swartz, JR., KBIC President
Jane Kahkonen, KBIC Air Quality Specialist

Ambient Air Comments: Record No. 19

Submitted on 01/09/2019 12:56PM
Submitted values are:

First Name: Danny
Last Name: Wong
Organization: NJDEP - DAQ
Email address: danny.wong@dep.nj.gov
Comment:
Here are the NJDEP comments for EPA's draft Ambient Air Guidance:

o EPA should not adopt the Revised Policy On Exclusions from "Ambient Air" (November 2018) because it will allow existing sources to increase emissions where they could not before. Also, this could result in new polluting sources to be built where they would impact a nonattainment area.
This is especially concerning since some states upwind of New Jersey are statutorily precluded from being more stringent than EPA. Therefore, these states would allow sources to ignore any violations based on this new policy and other recent EPA relaxations. The results would be more pollution being transported into New Jersey that will negatively impact the State's air quality.

o The air quality modeling for EPA's CSAPR Update shows that the NJ-NY-CT nonattainment area would attain the 2008 ozone NAAQS by 2023. However, that modeling did not account for the many recent rule proposals/adoptions and policies that relax requirements on emission sources, each of which has the potential to cause an increase of emissions. Collectively, the likely effect of EPA's wide-ranging deregulatory efforts substantially undermines EPA's modeling assumptions. With all of these changes being made, New Jersey urges EPA re-evaluate the modeling assumptions.

o If EPA insists on finalizing this relaxation, New Jersey urges EPA to only apply this to specific programs discussed in the guidance, specifically PSD.
EPA must not apply this in the future to other programs such as air monitoring and NAAQS implementation.

Ambient Air Comment: Record No. 20

Submitted on 01/09/2019 2:02PM
Submitted values are:

First Name: Stuart
Last Name: Spencer
Organization: Arkansas Department of Environmental Quality; Associate Director, Office of Air Quality
Email address: SPENCER@adeq.state.ar.us
Comment: With regard to the U.S. Environmental Protection Agency's (EPA) reevaluation for update on the Policy on Exclusions from Ambient Air, the Arkansas Department of Environmental Quality (ADEQ) supports the EPA's effort to provide flexible policy options to accommodate changing technologies and standards regarding the establishment and maintenance of methods for controlling general public access to private property. Because the EPA's long-standing policy was fundamentally grounded on an interpretation of the phrase "to which the general public has access", ADEQ believes an evaluation of this phrase should not be restricted to physical barriers. Rather, as EPA has done in practice, demonstrations of restricted public "access" should be considered on a case-by-case basis and should not consider physical barriers to be the only allowable means of preventing physical public access while maintaining the goal of public health protection. To this end, ADEQ believes it is appropriate to exclude the atmosphere over land owned or controlled by the stationary source where the owner or operator of the source employs measures that effectively preclude the general public's access to the land.

January 10, 2019

United States Environmental Protection Agency
New Source Review (NSR) Permitting
Ambient Air Policy

Subject: Comments on EPA draft guidance *Revised Policy on Exclusions from "Ambient Air"*

The South Carolina Department of Health and Environmental Control (SCDHEC) appreciates this opportunity to comment on the draft guidance *Revised Policy on Exclusions from "Ambient Air."* This guidance is a revision to the policy that has been in effect since 1980 that defines what areas must be addressed for compliance with the National Ambient Air Quality Standards (NAAQS) and Prevention of Significant Deterioration (PSD) Increments in the air quality analysis that is required as part of the PSD permitting process.

SCDHEC supports this update to the EPA's ambient air policy. We believe the guidance allows for a more common-sense approach to the determination of what is considered ambient air and will allow permitting authorities to consider the full range of measures to prevent public access to those areas not required to be considered ambient air. We believe this will allow facilities the flexibility to use effective measures to prevent public access, thus protecting public health, without having to resort to impractical or overly burdensome requirements to install a fence or other physical barrier when other measures may be as, or even more, effective. In recognition that non-physical measures can be more effective at preventing access (e.g., an electronically monitored boundary can be more effective at alerting security personnel to intrusions onto a facility's property and allowing more effective response than an unmonitored fence), we suggest changing the language at the bottom of page 4 in the guidance from "…when other means of precluding or deterring access by the general public may be equally effective" to "…when other means of precluding or deterring access by the general public may be *as, or even more, effective.*"

Again, we appreciate this opportunity to provide comment and participate in the stakeholder process for revising this important policy. If you have questions or need additional information, please contact John Glass at (803-898-4074) or glassjp@dhec.sc.gov.

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January 10, 2019

VIA ELECTRONIC MAIL

COMMENTS OF THE NAAQS IMPLEMENTATION COALITION ON THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY'S DRAFT GUIDANCE ENTITLED: "REVISED POLICY ON EXCLUSIONS FROM 'AMBIENT AIR'" NOVEMBER 2018

The National Ambient Air Quality Standards ("NAAQS") Implementation Coalition submits these comments to the Environmental Protection Agency ("EPA" or "Agency") on its draft guidance entitled "Revised Policy on Exclusions from 'Ambient Air'" ("Draft Guidance"). The NAAQS Implementation Coalition is comprised of trade associations, companies, and other entities that confront challenges in permitting and operating facilities under increasingly-stringent NAAQS.

OVERVIEW

We appreciate EPA's efforts to update its long-standing, and increasingly difficult to navigate, policies for permitting new or modified major stationary sources. The Draft Guidance provides reasonable regulatory relief that fosters economic development while still protecting air quality and human health. The Draft Guidance's notice-and-comment process also allows the public an opportunity to provide comments, including information on current impacts and suggested additional revisions, on an ambient air policy that EPA developed internally over 40 years ago.

As we noted in our May 15, 2017, comments to EPA's regulatory reform docket, there is growing concern that EPA has been promulgating increasingly stringent NAAQS in recent years without also developing clear and timely plans for their implementation.[1] This imbalance has created substantial permitting difficulties for American business and manufacturing, inhibiting job growth and needlessly adding to administrative burdens for

[1] NAAQS IMPLEMENTATION COAL., COMMENTS OF THE NAAQS IMPLEMENTATION COALITION ON THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY'S REQUEST FOR COMMENT ENTITLED "EVALUATION OF EXISTING REGULATIONS" 2, May 15, 2017, Docket No. EPA-HQ-OA-2017-0190-36049.

states. To that end, those comments specifically called on EPA to update its long-standing policy regarding the placement of receptors to model ambient air impacts, noting that the existing policy creates unrealistic expectations of permittees.[2]

We recognize that the Draft Guidance responds to this call and hope that EPA will continue paying close attention to NAAQS implementation concerns. At over 40 years old, EPA's ambient air policy is long overdue for an update. EPA's work on the Draft Guidance is therefore appropriate and reasonable. As explained below, though, we believe that the Draft Guidance should be further refined to provide a practical and protective approach to real-world situations. EPA can address these revisions in a manner fully consistent with the current regulatory definition of "ambient air."

- The Draft Guidance allows permitting authorities greater flexibility to consider measures other than fences or other physical barriers when examining measures in a permit to preclude public access to an area. However, the Draft Guidance's specific policy statement requires that those measures be "employed" by the source owner or operator. This could lead permitting authorities, despite precedent to the contrary cited in the Draft Guidance itself, not to consider natural features like rugged terrain or waterways as precluding public access.

- The Draft Guidance retains requirements that only an area owned or controlled by a permit applicant may be exempted from model receptor placement. This policy unnecessarily requires assessment of air quality in areas where the likelihood of general public access is small, simply because a permit applicant lacks ownership or control of that area. EPA should move beyond an ambient air policy with such narrow exceptions and towards a broader and more natural one based on the public's ability to access an area.

Good air quality policy need not be a trade-off between clean air and economic development. In fact, the Clean Air Act is clear that the PSD permit program should "insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources."[3] Our experience has been that air quality protection and economic growth are best achieved through a cohesive NAAQS strategy that pairs standard development with commensurate attention to implementation. The Draft Guidance is an important step in that direction, and we commend EPA for taking it. By further clarifying its ambient air policy,

[2] *Id.* at A-4-A-5.

[3] Clean Air Act §160(3), 42 U.S.C. §7470(3).

EPA can strike an even better balance to "insure preservation of existing clean air resources and facilitation of economic growth."[4]

COMMENTS

I. The Draft Guidance Addresses Long-Overdue Reforms to EPA's Two-Pronged "Historic Approach" to Ambient Air Policy.

EPA's regulations for the New Source Review program do not define "ambient air." The Agency instead relies upon its general regulatory definition of the term, "that portion of the atmosphere, external to buildings, to which the general public has access."[5] The Draft Guidance notes that EPA has long recognized that some areas that are external to buildings are also not covered by the regulatory definition of ambient air.[6]

A 1980 letter from then-Administrator Costle to Senator Jennings Randolph, which states that "we are retaining the policy that the exemption from ambient air is available only for the atmosphere over land owned or controlled by the source and to which public access is precluded by a fence or other physical barriers," is often cited as the origin of EPA's exception from "ambient air," and the limitations of that exception.[7] However, EPA's ambient air policy dates even further back, with underlying concepts found in EPA memoranda from as early as 1972.[8]

The Draft Guidance summarizes EPA's "historic approach" to exempting areas from the "ambient air" definition as a two-pronged test: (1) ownership or control by the source of an area and (2) preclusion of public access by physical barriers.[9] The Draft Guidance notes that EPA has never codified either of these prongs in the regulatory definition of "ambient air" or elsewhere in regulations.[10]

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[4] *Id.*

[5] 40 C.F.R. § 50.1(e).

[6] Draft Guidance at 2.

[7] Letter from EPA Adm'r. Douglas Costle to Sen. Jennings Randolph, Chairman, Comm. on Env't. and Pub. Works, Dec. 19, 1980.

[8] Memorandum from Michael A. James, Attorney, Air Quality and Radiation Div., to Jack R. Farmer, Chief, Plans Mgmt. Branch on Ambient Air Quality Monitoring by EPA, Sep. 28, 1972.

[9] Draft Guidance at 2-3.

[10] *Id.* at 3.

According to EPA, each of these prongs is fundamentally grounded on an interpretation of the regulatory phrase "to which the general public has access."[11] To be sure, ownership or control of land and the presence of physical barriers are important factors in assessing the general public's ability to access an area. However, EPA's historic two-pronged approach acts as a "bright line" test that elevates consideration of these factors, not merely above, but at the exclusion of all others. What should be a holistic case-by-case analysis of the general public's ability to enter an area is summarized down to the strength of a deed and height of a fence—regardless whether an area is otherwise restricted or even impossible to enter.

EPA may have intended to bring consistency to ambient air policy through employing such a bright line test. The historic two-pronged approach has proven so rigid that consistent implementation has been impossible. Indeed, after evaluating the current state of federal ambient air policy, the Minnesota Pollution Control Agency recently concluded that "[r]eceptor replacement strategies have varied over the years, creating an inconsistent understanding and application of the NAAQS and federal definition of ambient air in air quality modeling demonstrations."[12]

The historic two-pronged approach's inflexibility also misdirects analysis away from the general public's ability to enter an area to focus on other tangential issues. This leads to seemingly arbitrary results:

- The same area may be considered ambient air if a trespasser ignores "No Trespassing" signs or climbs through barbed wire to enter it but may not be ambient air if the trespasser climbs over a fence to get there.

- An area owned or controlled by a permit applicant may not be ambient air because the public cannot pass through surrounding rocky terrain or bodies of water to get there. However, if that same rocky terrain or body of water is not owned by the applicant, it is considered ambient air, despite its impassibility.

- An area, like a roadway or train line, where it may be impossible for anyone—member of the general public or not—to remain for a prolonged period, much less for the form of a NAAQS, is not ambient air only if it is owned or controlled by a permit applicant.

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[11] *Id.* at 3.

[12] Memorandum from the Minn. Pollution Control Agency on the Clarification of MPCA Working Practice to Evaluate the Federal Definition of Ambient Air in Air Quality Dispersion Modeling 1, Mar. 28, 2017.

Unnecessarily restrictive policies with results like these could be more readily tolerated under higher NAAQS. With EPA's recent, more stringent NAAQS, there is less margin between standards and background air concentrations to pursue reasonable economic development while absorbing rigid NAAQS implementation policies. As the Draft Guidance notes regarding the historic two-pronged approach, "[t]he policy articulated by Administrator Costle has over time resulted in concerns, such as those expressed by parties seeking to obtain permits under the PSD program, especially after the promulgation of increasingly stringent National Ambient Air Quality Standards (NAAQS)."[13]

For these reasons, we support EPA's review of its ambient air policy. However, we believe the Draft Guidance should be further improved. We appreciate that the Draft Guidance seeks to address inflexibility in the historic approach's preclusion-of-public-access prong. We are concerned, though, that the Draft Guidance's policy statement does not fully accomplish this goal. More broadly, we believe that EPA should take a harder look at its historic two-pronged approach. We encourage EPA to consider a more nuanced view of ambient air policy, one that focuses on the general public's actual ability to enter an area, rather than just two components of that analysis.

II. EPA's Draft Ambient Air Policy Statement Should Be Revised to Fully Accomplish the Flexibility Described in the Draft Guidance.

EPA recognizes that the historic approach's preclusion-of-public-access prong simply cannot be applied in all real-world circumstances. While analysis under the prong is to look to the presence of fences or physical barriers to preclude public access, the Draft Guidance concedes that "[i]n its review of individual situations on a case-by-case basis, the EPA in a few instances has agreed that an area may qualify for exclusion from ambient air notwithstanding the fact that the specific property or facility at issue, or a certain portion of the property or facility, was not completely surrounded by a fence or other physical barriers."[14]

EPA's Environmental Appeals Board previously recognized in a number of instances that the public can be precluded from land even in the absence of a continuous fence or other physical barrier. For example, it found that a continuous fence was not necessarily required

[13] *Id.* at 3.

[14] Draft Guidance at 4 (citing EPA, *Approval and Promulgation of State Implementation Plans; Utah Sulfur Dioxide Plan*, 50 Fed. Reg. 7,056, 7,057 (Feb. 20, 1985) (allowing ambient air exclusion based on cumulative effect of company's extensive property holdings, installation of fences, posts, and "No Trespassing" signs, security patrolling, and the rugged mountainous terrain)).

where other measures exist that would effectively preclude public access.[15] More recently, it explained in a decision approving reliance on a Coast Guard exclusionary zone as a surrogate for a physical barrier that "[t]he important fact is that access within the zone will be strictly limited, not the reason behind it."[16]

Despite this recognition of the need for flexibility, there remains inconsistency in the application of the preclusion-of-public-access prong, often times leading to inflexibility. For example, EPA Region 7 expressed concern in 2000 that a barbed-wire fence with "No Trespassing" signs may not be adequate to keep the general public off land.[17] In 1987, EPA officials sent letters to EPA regional offices noting that "even remotely used" areas need to be fenced before a presumption that general public access is precluded is warranted for purpose of ambient air determination,[18] and that a waterway with little-or-no recreational traffic would still not be considered a physical barrier.[19]

Providing more flexibility in the preclusion-of-public-access prong is not only reasonable but also would be consistent with the approach taken by at least one state.[20] Therefore, we agree with EPA that fencing and physical barriers may not be necessary to preclude public access from an area.[21] We further agree that the use of clearly visible, well-spaced "No Trespassing" signs, either with or without fencing, may be effective in certain areas.[22]

We are concerned, however, that the Draft Guidance's revised policy statement on ambient air does not fully reflect the flexibility described in the rest of the document. The

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[15] *In Re: Hibbing Taconite Co.*, 2 E.A.D. 838 (Jul. 19, 1989).

[16] *In Re: Shell Gulf of Mex. & Shell Offshore, Inc.*, OCS Appeal Nos. 11-02, 11-03, 11-04 & 11-08 61, n. 56 (Jan. 12, 2012).

[17] Letter from Donald C. Toensing, Chief, Air Permitting and Compliance Branch, EPA Region 7 to W. Clark Smith, Supervisor, Air Quality Permitting Section, Neb. Dep't. of Envtl. Quality 2, Aug. 1, 2000.

[18] Letter from G. T. Helms, Chief, Controlled Programs Operations Branch to Bruce Miller, Chief, Air Programs Branch, EPA Region IV, Apr. 30, 1987.

[19] Letter from G. T. Helms, Chief, Controlled Programs Operations Branch to Steve Rothblatt, Chief, Air Branch, EPA Region V, Apr. 30, 1987.

[20] MINN. POLLUTION CONTROL AGENCY, AIR DISPERSION MODELING PRACTICES MANUAL 25 (Oct. 2017) (distinguishing ambient air policy under federal NAAQS and the Minnesota Ambient Air Quality Standards by noting that under the latter, "[t]here is no specific requirement for fencing or related barriers to preclude public access.").

[21] *See* Draft Guidance at 5.

[22] *Id.* at 6.

Draft Guidance revises EPA's ambient air policy by replacing the phrase "a fence or other physical barriers" with the phrase "measures, which may include physical barriers, that are effective in deterring or precluding access to the land by the general public."[23] EPA expects that this change will provide greater flexibility in determining where to place modeling receptors for air quality analyses.[24]

This revision broadens the type of measures that a permit applicant may employ to preclude public access, but not far enough. Those measures are still limited to those that can be employed by the source owner or operator. Thus, while the Draft Guidance acknowledges various precedents relying on natural features to preclude public access,[25] the revised ambient air policy statement may not actually provide for consideration of natural features. We recommend that the policy statement should be further refined to acknowledge that measures not employed by the source owner or operator can deter or preclude access. There are a number of revisions available to address this issue, including, for example, the following:

> *the atmosphere over land owned or controlled by the stationary source, where ~~the owner or operator of the source employs~~ circumstances or measures, which may include physical barriers employed by the owner or operator of the source, ~~that~~ are effective in deterring or precluding access to the land by the general public.*

As noted below, just editing the historic two-pronged approach addresses only part of the challenge here. We believe that EPA should recast its ambient air policy beyond narrow exclusions and towards a broader examination of the public's access to, or ability to enter, an area. However, insomuch as EPA seeks to align the Draft Guidance's policy statement with the policy goals discussed in the Draft Guidance, provide reasonable expectations under the historic two-pronged approach's preclusion-of-public-access prong, and formalize flexibility already recognized by permitting authorities, the above changes, at a minimum, are desirable.

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[23] *Id.* at 5.

[24] *Id.* at 5.

[25] *Id.* at 4-5 ("Although that case involved permitting of a source located over water, where installation of a fence or other physical barriers was not feasible, the language of the regulatory definition of ambient air does not preclude extending this reasoning to other factual situations. For example, there are situations over land where it may also be impractical or unduly burdensome to require a source to install a fence or other physical barriers when other means of precluding or deterring access by the general public may be equally effective.")

III. EPA Should Consider a Broader Approach to Ambient Air Policy that is Practical and Protective in Real-World Situations.

With increasingly-stringent NAAQS requiring more flexible implementation, revision of EPA's historic two-pronged approach to ambient air policy is appropriate—but more should be done. EPA should not blind itself from areas' actual circumstances for the sake of maintaining its historic approach. The Agency can more practically confront real-world situations while still protecting air quality by taking a broader approach to ambient air policy.

Addressing inflexibility in the current ambient air policy's preclusion-of-public-access prong is a good start to such a reform. However, by retaining the existing ambient air policy's ownership-or-control prong, the Draft Guidance would still have permit applicants unrealistically model areas where the general public would not reasonably be found to have the ability to enter, much less be exposed to criteria pollutants for the averaging time and form of a NAAQS (*e.g.*, waterways, roadways, railways, rugged terrain, or steep slopes). This leads to results that are illogical when viewed outside the context of the historic two-pronged approach.

For example, EPA Region 4 overturned a permit where the South Carolina Department of Health and Environmental Control ("DHEC") had observed that exposure to criteria pollutants on a road running through the permit applicant's property at the form of a NAAQS was unlikely.[26] According to DHEC, "[t]raversing this dirt road takes less than 60 seconds at moderate speeds. There are no ambient standards that are based on individuals being negatively effected [sic] based on traversing an industrial property in a vehicle for less than one minute."[27] Region 4 nevertheless determined that permit modeling receptors were required along the road because the permit applicant did not own or control it. Similarly, Region 4 determined that a railroad right-of-way through a permit applicant's property, for which there was demonstrably limited general public access, was still ambient air because the applicant did not control the right-of-way.[28]

Rather than forcing ambient air policy into a two-pronged bright-line test, EPA should adopt a more straight-forward approach that judges "access" in light of all factors reflecting

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[26] Letter from Gregg M. Worley, Chief, Air Permits Section, EPA Region 4 to Sheila Watts, Eng'g. Serv. Div., Bureau of Air Quality, S.C. Dep't. of Health and Envtl. Control 1, May 31, 2012.

[27] S.C. DEP'T. OF HEALTH AND ENVTL. CONTROL, BUREAU OF AIR QUALITY, FINAL DETERMINATION AND FINAL NOTICE OF MACT APPROVAL FOR SHOWA DENKO CARBON, INC. DORCHESTER COUNTY, S.C. 39, June 8, 2012.

[28] Letter from R. Scott Davis, Chief, Air Planning Branch, EPA Region 4 to Ronald W. Gore, Chief Air Division, Ala. Dep't. of Envtl. Mgmt., Sep. 9, 2011.

the general public's preclusion from—or, put differently, ability to enter—an area. EPA has noted in the past, "'[p]reclude' does not necessarily imply that public access is absolutely impossible, but rather that the likelihood of such access is small."[29] Consistent with EPA's historic approach when analyzing the general public's ability to enter an area, preclusion need not unrealistically assume absolute prevention of access.

Extending this rationale, a permitting authority should be able to consider the general public's ability to enter an area as being precluded where exposure to a criteria pollutant for the averaging time or form of a standard is actually or effectively precluded, for any reason and regardless of ownership or control of an area. Such an area should not be considered "ambient air" under the regulatory definition.

This approach is consistent with other EPA policies. EPA has recognized that modeling for designations in certain locations "such as water bodies, receptors can be excluded or ignored in analyses as monitors could not feasibly be placed in those areas."[30] It is also consistent with the approach taken by states. For example, Louisiana does not apply its state ambient air standards to roads, railroads, water bodies, or other areas "where activities are transient in nature and long-term exposure to emissions is not reasonably anticipated."[31]

The Draft Guidance acknowledges stakeholder concerns about modeling requirements arising from the ownership-or-control prong,[32] but declines to make any changes.[33] We encourage EPA to reconsider this decision and further improve ambient air policy.

CONCLUSION

EPA's ambient air policy has grown increasingly obsolete over the past 40 years. We applaud EPA's efforts to modernize it toward better and more realistic NAAQS implementation. But, there remains room for improvement.

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[29] Memorandum from Steven Page, Director, Office of Air Quality Planning and Standards, to Reg'l. Air Div. Dirs. on the Interpretation of Ambient Air in Situations Involving Leased Land Under Regulations for Prevention of Significant Deterioration 7, n. 1, June 22, 2007.

[30] DRAFT SO_2 NAAQS DESIGNATIONS MODELING TECHNICAL ASSISTANCE DOCUMENT 9, Aug. 2016.

[31] LA. ADMIN. CODE TIT. 33 § 5109(B) (1).

[32] Draft Guidance at 6 ("[S]takeholders have requested that the EPA reconsider aspects of the ambient air policy that they consider to be inflexible or outdated, such as the need to demonstrate NAAQS attainment just beyond the property boundary in areas where few or no members of the general public are expected to be present.").

[33] *Id.* at 6.

The Draft Guidance's ambient air policy statement should be further revised to reflect the flexibility described in the rest of the document. More generally, EPA should move beyond an ambient air policy of narrow exclusions and more broadly view ambient air in line with the general public's ability to enter an area. Such an approach would assess all factors informing the general public's preclusion from an area, rather than just the two prongs in EPA's historic approach. These changes would foster a real-world approach to ambient air policy that preserves clean air resources while providing for economic growth.

We appreciate the opportunity to comment on the Draft Guidance and look forward to continuing to work with the Agency on this and other NAAQS implementation issues.

Sincerely,

Joseph C. Stanko, Jr.
Counsel for the
NAAQS Implementation Coalition

THE STATE of ALASKA
GOVERNOR MICHAEL J. DUNLEAVY

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January 10, 2019

U.S. Environmental Protection Agency
Submitted via email to: Ambient_Air_Guidance@epa.gov

Subject: Alaska Department of Environmental Conservation Comments on Draft Guidance: Revised Policy on Exclusions from "Ambient Air"

To whom it may concern:

The Alaska Department of Environmental Conservation, Division of Air Quality (Division), welcomes the opportunity to review the U.S. Environmental Protection Agency's (EPA's) November 2018 *Draft Guidance: Revised Policy on Exclusions from "Ambient Air"* (revised policy). Upon review, the Division is providing the following comments on EPA's revised policy for consideration.

Comment 1: EPA's revised policy should explicitly acknowledge that a reliance upon natural features may be among a set of appropriate, albeit passive measures to preclude public access for select stationary sources in remote locations.

The Division understands that EPA's revised policy states "[a]*ir agencies should consider any information…regarding the effectiveness of the measures to prevent public access*", which could include the consideration of natural features. Illustratively, Alaska possesses a number of stationary sources that are situated many miles from the nearest community or public roadway. Their workers are often housed on-site and provided access by the owner or operator via aircraft, helicopter, boat, and/or bus using private roads and airfields. Division staff, therefore, frequently consider natural features such as terrain, vegetation, and/or distance as potential physical barriers requiring a level of effort equal to or greater than that of a fence to transgress. The conclusion of the revised policy, nevertheless, advances the language "…*where the owner or operator of the source employs measures*…" within the context of precluding public access; this language implies that an action must be taken in order to ensure efficacy. Moreover, the revised policy remains largely silent on whether or not natural features can serve as effective measures to preclude public access, notably in its conclusion.

Comment 2: EPA's revised policy should clearly indicate both its primary role as a 'guidance document' and that air agencies may independently consider a range of measures to preclude public access when evaluating the adequacy of a proposed ambient air boundary.

The Division understands that EPA's revised policy is crafted to offer stakeholders greater flexibility in the evaluation of measures to preclude pubic access. Nevertheless, the revised policy's attendant

discussion introduces ambiguity in describing the adequacy of discrete measures. As an example, Section III, Page 6 of EPA's revised policy states that "[e]*ven under the prior policy, it was always possible for some fences to be scaled and other types of barriers to be breached.*" By contrast, the prior policy's specification of "*...a fence or other physical barriers...*" provided air agencies with clear metric for evaluating and comparing measures to preclude public access. Furthermore, the prior policy indicated that public access was to be precluded, whereas the revised policy expands this criteria to *deterred* or precluded. The latter criteria is imprecise and establishes an indefinite threshold for acceptance under 40 C.F.R. 50.1(e). Therefore, an emphasis on agency-level decision-making regarding the case-specific suitability of particular measures to preclude public access, e.g. surveillance, signage, patrols, natural features, etc., will likely provide for more desirable and efficient regulatory outcomes.

Sincerely,

Alice Edwards, Director
Division of Air Quality
Department of Environmental Conservation

cc: Lynn Kent/ADEC Deputy Commissioner
Jim Plosay/ADEC, Air Permits Program, Juneau
Aaron Simpson/ADEC, Air Permit Program, Juneau
Patrick Dunn/ADEC, Air Permits Program, Anchorage

GENEVIEVE JONES
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January 4, 2019

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Subject: Revised Policy on Exclusions from "Ambient Air"

To Whom It May Concern:

The Big Pine Paiute Tribe of the Owens Valley ("Tribe") would like to submit the following comments on the EPA's draft guidance titled "Revised Policy on Exclusion from Ambient Air." The Owens Valley area of California is most concerned with ground level ozone and particulate matter (PM) revisions or review process to the existing National Ambient Air Quality Standards (NAAQS). The Tribe anticipates that this proposal would allow sources of air pollution to expand in area around each source that is not considered "ambient air", thus limiting detection of the sources' and bypassing violations of the NAAQS that the source may have caused under the previous policy. The Tribe is concerned about the effect this potential increase in air pollution will have on the health and welfare of indigenous peoples in our area (nonattainment for PM10). In addition, will a different interpretation of ambient air consider all impacts of ground level ozone. The impacts of ground level ozone and particulate matter sources on the Eastern Sierra ecosystem involve human respiratory issues, ozone sensitive plant damage, areas devoid of vegetation will be a source of PM, known effects on vertebrates and invertebrates.

EPA has recently announced that it plans to revisit its longstanding interpretation of "ambient air," defined in 40 C.F.R. § 50.1(e) as "the atmosphere, external to buildings, to which the general public has access." This regulatory definition, and EPA's interpretation of the term, is of key importance in implementing the Clean Air Act (CAA) because the statute, while using the term "ambient air" as part of the foundations of U.S. air regulation, provides no definition for the term. The core purpose of the CAA is to prevent pollution of ambient air in order to protect public health and welfare, and a fundamental basis of the Act is the mandate to achieve and maintain National Ambient Air Quality Standards (NAAQS). Considering the fundamental importance of the term and the nearly forty years of consistent interpretation by EPA, we agree with the National Tribal Air Association's (NTAA) concerns regarding the agency's proposed change in policy.

The Big Pine Paiute Tribe wants to re-iterate substantive concerns such as the potential negative impacts to health and welfare that would result from the Administration initiating a proposed rule based on their review of the science used in setting regulations issued by EPA including NAAQS. EPA has indicated that the intention for the NAAQS reviews is to recommit EPA to a "process that protects public health and the environment, and is timely, complete, based on transparent information, balanced with respect to policy and science, and determined to inform our state partners with the information needed." (https://www.epa.gov/criteria-air-pollutants/process-reviewing-national-ambient-air-quality-standards) The Tribe would like to see the EPA continue to use the scientific information obtained from all air districts to inform NAAQS. We would also like further clarification on "transparent information" and how science will be used to evaluate NAAQS and any policy revisions. Based on these concerns, we oppose this revision to policy and ask that EPA retain its longstanding approach with regard to NAAQS. In the alternative, should the agency choose to move forward, we ask that the agency perform the analysis needed to support its decision-making process, and postpone final action until EPA, the Tribes, and the public have the opportunity to consider fully the impacts of this action.

It has taken many years (40-year precedent) for the current NAAQS to be put in place after much scrutiny, evaluation by EPA and national air districts, and we see no need for the agency to adjust current policy. We believe that EPA's longstanding approach should be maintained. This proposed policy revision is seeking a solution without a problem. We therefore oppose EPA's proposed action and request that the agency maintain the longstanding interpretation without changes.

Sincerely,

Genevieve Jones
Tribal Chairwoman

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January 11, 2019

William Wehrum
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US Environmental Protection Agency
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RE: Revised Policy on Exclusions from "Ambient Air"

Honorable Assistant Administrator Wehrum:

The National Tribal Air Association (NTAA) is pleased to submit these comments on EPA's draft guidance titled "Revised Policy on Exclusion from Ambient Air."

The NTAA is a member-based organization with 137 principal member Tribes. The organization's mission is to advance air quality management policies and programs, consistent with the needs, interests, and unique legal status of Indian Tribes. As such, the NTAA uses its resources to support the efforts of all federally recognized Tribes in protecting and improving the air quality within their respective jurisdictions. Although the organization always seeks to represent consensus perspectives on any given issue, it is important to note that the views expressed by the NTAA may not be agreed upon by all Tribes. Further, it is also important to understand interactions with the organization do not substitute for government-to-government consultation, which can only be achieved through direct communication between the federal government and Indian Tribes.

EPA has recently announced that it plans to revisit its longstanding interpretation of "ambient air," defined in 40 C.F.R. § 50.1(e) as "the atmosphere, external to buildings, to which the general public has access." This regulatory definition, and EPA's interpretation of the term, is of key importance in implementing the Clean Air Act (CAA) because the statute, while using the term "ambient air" as part of the foundations of U.S. air regulation, provides no definition for the term. The core purpose of the CAA is to prevent pollution of ambient air to protect the public health and welfare, and one of the fundamental strategies the Act uses to reach this goal is the mandate to achieve and maintain National Ambient Air Quality Standards (NAAQS). In turn, those ambient air standards dictate State and Tribal Implementation Plan provisions, and are implemented through most of the major programs under the Act. *See, e.g.*, 40 C.F.R part 60 (New Source Performance Standards repeatedly use the term ambient air in setting limitations for all source categories); 40 C.F.R. part 51, subpart I (new source review and prevention of significant deterioration programs' purpose is to attain and maintain the ambient air standards). Considering the fundamental importance of the term and the nearly forty years of consistent interpretation by EPA, we have a number of concerns regarding the agency's proposed change in policy.

First, we wish to share certain substantive concerns, including the potential negative impacts to health and welfare that would result from this reinterpretation in and near

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Indian Country. Second, we believe the process EPA has followed here is entirely insufficient to inform the agency and the public regarding this major change in policy and its detrimental impacts on the people and the environment. Based on these concerns, we oppose this revision to policy and ask that EPA retain its longstanding approach. In the alternative, should the agency choose to move forward, we ask that the agency perform the analysis needed to support its decision-making process, and postpone final action until EPA, the Tribes, and the public have the opportunity to consider fully the impacts of this action.

Substantive Policy Issues

The NTAA anticipates that this proposal would allow sources of air pollution to expand the amount of area around each source that is exempted from ambient air, thus limiting the detection of the sources' air pollution further and bypassing violations of the NAAQS that the source may have caused under the previous policy. We are concerned about the effect this potential increase in air pollution will have on the health and welfare of indigenous peoples throughout the United States. In addition, as discussed in greater depth regarding our procedural concerns, because no data is available to inform the effects we can expect here, this increase in pollution and the scale of its effects is currently unquantifiable.

We expect the removal of the fencing requirement from EPA's understanding of ambient air to have disproportionate impacts on Tribes. Native Americans use the land in traditional ways, including pastoralism, to a greater extent and with greater duration than the average American. Additionally, air quality impacts extend to hunting, fishing, and gathering rights of Tribes in Ceded Territories, lands that Tribes transferred to the federal government in exchange for off-reservation rights by a treaty agreement. We expect this proposed policy will negatively affect the treaty rights of Tribes to continue to sustain themselves by accessing resources on ceded lands across the United States. For many Tribes, traveling over land or pasturing herds across open land is a way of life, and we anticipate the greater exceptions for "ambient air" under this revised policy would cause Native Americans to experience greater exposure to pollution than most Americans.

We also question the necessity of this action. Reversing longstanding policy should only be done for good reason and after careful analysis, and in this instance there appears to be little important policy gain from the change, rather certain clear detriments. Removing the fencing requirement would eliminate the existing bright line rule, which is far easier to implement than the nebulous and *ad hoc* considerations EPA and industry will need to engage in under the revised policy. Fences are not only clear and simple markers of boundaries, but provide easily identifiable boundaries managed by a particular facility and they provide a common sense and easily verifiable border for determining what is and is not "ambient air."

Further, the NTAA notes that should sources need an exception to the fencing requirement due to unusual circumstances, they may already receive one under EPA's existing interpretation. The agency has applied a rule of reason and, for example, granted exceptions where terrain makes fencing difficult but effectively excludes the general public. *See* EPA, AMBIENT AIR REVIEW TEAM OVERVIEW at 11, http://www.cleanairinfo.com/regionalstatelocalmodelingworkshop/archive/2017/Presentations/2-6_2017_RSL-AART.pdf (case study of Audubon Material (a.k.a. Central Plains Cement) ambient air analysis in which EPA determined terrain was sufficient to preclude access). EPA points out this flexibility in the revised policy's discussion of *REDOIL v. EPA*. 716 F.3d 1155 (9th Cir. 2012).

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There, the agency was confronted with how to set ambient air boundaries for an offshore oil and gas drillship, and chose to use the Coast Guard's 500-meter effective safety zone around the ship at sea as a substitute for fencing, a common sense decision that was upheld by the Ninth Circuit. *Id.* at 1159, 1165. *REDOIL* demonstrates the flexibility to address unusual circumstances in EPA's existing understanding of "ambient air." While EPA uses *REDOIL* to support removing the fencing exception, the NTAA reads it as support for retaining the fencing requirement in addition to the existing flexibility EPA already applies. Fencing may not be practical over water; therefore, the necessity of an exception in that specific case does not justify altering the rule for every other instance.

In addition to the loss of a bright line rule and the accompanying implementation costs, we note that infrastructure costs may also follow on this policy change. If the agency or sources have set up monitoring equipment at the edge of the current ambient air for the source, that equipment, nationwide, must likely be moved and recalibrated. The NTAA requests an assessment of this matter and analysis of costs.

Procedural Concerns

Our substantive concerns here are aggravated by the lack of information and analysis available on this matter. EPA has released only a brief policy and legal document with no technical, staff-level analysis of its impacts on the environment or on the costs and benefits of this policy decision. While we acknowledge that this agency action is not a regulation, which would trigger sufficient environmental review and Executive Order 12866 costs and benefits analysis, this policy revision nevertheless will alter how air emissions and violations of the NAAQS are measured across the nation. We believe EPA's proposed revision amounts to a major agency action with a significant effect on the human environment, and therefore EPA should engage in some form of environmental analysis of the issue.

While 15 U.S.C. § 793(c) exempts actions taken under the CAA from National Environmental Policy Act (NEPA) analysis, Congress did so because the typical CAA action involves considerable environmental analysis mandated by the statute, and thus the functional equivalent of NEPA is achieved by the agency's work. There was no such analysis at all in this case; the agency is moving forward blindly, and the public, including the NTAA and its member Tribes, are almost completely uninformed about the implications of this action. At least some environmental analysis is called for here, and the agency should conduct this work to inform its decision and the public appropriately.

Also, considering the vast reach of the new policy, and the cost and benefit concerns we raise above, an analysis of the cost and benefits of this rule is necessary and we request that EPA perform that assessment.

Conclusion

EPA's current approach is not broken, and we see no justification for the agency to provide a fix. We believe that EPA's longstanding approach should be maintained, and we strongly oppose EPA's proposed policy change.

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Fencing is a reliable, clear way to ensure that the ambient air exception applies reasonably to every site. The NTAA acknowledges that fencing was never a perfect solution to the question of how much atmosphere a source should be allowed to use to dilute its emissions, but it was a sensible solution to the issue. This proposed policy revision is seeking a solution without a problem. We therefore oppose EPA's proposed action and request that the agency maintain the longstanding interpretation without changes.

In the alternative, if EPA chooses to move forward with this policymaking process, we ask that the agency take a careful, measured look at the impacts of its decision and at what measures are consistent with the Act's language and purpose: to protect the public health and welfare by achieving and maintaining clean ambient air. To achieve this, the agency should perform the environmental analysis that would be required under the Clean Air Act for a rulemaking procedure, and the social costs and economic analysis that would be performed in a Regulatory Impact Analysis. This standard analytical approach to issues of national import is needed to address this significant policy change. The agency should then release this information in a second period of public review and comment to inform the agency, the NTAA, our member Tribes, and the general public regarding the impacts of this action.[1]

In closing, the current interpretation of ambient air is based on a successful 40-year precedent and clear implementation, and we, therefore, vehemently oppose the finalization of this policy.

The NTAA appreciates this opportunity to comment on the draft "Revised Policy on Exclusion from Ambient Air." If you have any questions or require clarification from the NTAA, please do not hesitate to contact the NTAA's Project Director, Andy Bessler, at 928-523-0526 or andy.bessler@nau.edu.

On Behalf of the NTAA Executive Committee,

Wilfred J. Nabahe
Chairman
National Tribal Air Association

Cc: Ambient_Air_Guidance@epa.gov
Pat Childers, OAR
Laura McKelvey, OAQPS
Office of Information and Regulatory Affairs,
Office of Management and Budget (OMB)
Attn: Desk Officer for EPA,
725 17th St. NW, Washington, DC 20503

[1] We also note that the two key policy documents, which EPA relies on here, the 1980 letter from Administrator Costle and the 2007 Stephen Page memorandum, were not provided with the revised policy. While the NTAA obtained these documents and was able to review them to inform our comments, we request that EPA make these documents readily available to the general public in its second round of public review.

January 11, 2019

William L. Wehrum, Assistant Administrator Air and Radiation
Office of Air and Radiation, U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Attention: Informal Docket for EPA's Draft Guidance "Revised Policy [o]n Exclusions from 'Ambient Air'" *Submitted via web-based portal (https://www.epa.gov/nsr/forms/draft-guidance-revised-policy-exclusions-ambient-air) and as an attachment to: Ambient Air Guidance@epa.gov*

Re: Comments on Environmental Protection Agency's ("EPA's") Draft Guidance on Ambient Air

Dear Assistant Administrator Wehrum,

The Associations included on the attached List of Associations (collectively "the Associations") respectfully submit the attached comments on the Environmental Protection Agency's (EPA's) draft guidance, "Revised Policy [o]n Exclusions from 'Ambient Air'."[1] We support EPA's efforts to revise the existing ambient air policy, and greatly appreciate the opportunity to provide comment on the draft guidance before EPA issues a final version. We believe upfront engagement can improve the final product.

As explained further in our comments, EPA should revise the draft guidance to eliminate unnecessary complexity, expand the discussion to address ambient air modeling requirements for Prevention of Significant (PSD) permitting, and explain the nature of the policy as non-binding guidance. In summary, we recommend that the final guidance:

- Focus on "practical access" rather than concepts of ownership, control and stationary source;
- Not limit "measures" to only those "employed" by a stationary source;
- Expand the discussion to address railways, roadways and waterways;
- Recognize that "ambient air" decisions inform modeling analysis, but that it does not unequivocally define receptor placement;
- Acknowledge that traffic patterns, populations, the industrial nature of the area, and locations of "susceptible and vulnerable" populations in relation to the new probabilistic form of the NAAQS are relevant considerations in considering access issues within the PSD modeling analysis;

[1] EPA issued the draft for comment in November 2018.

- Explain the non-binding nature of the policy; and
- Refrain from referring to the policy as an exclusion or exemption.

These changes can be reflected in a policy that states, "*Ambient air does not include the atmosphere over contiguous or adjacent property, when measures or conditions, which may include physical or geographical barriers, effectively deter or preclude access to the land by the general public."*

We appreciate the opportunity to comment on this draft guidance before EPA issues it in final form. If you have any questions regarding the content of these comments, please contact Ted Steichen (SteichenT@api.org, 202-682-8568) at the American Petroleum Institute for the Associations.

Signed,

American Iron and Steel Institute (AISI)
American Petroleum Institute (API)
Council of Industrial Boiler Owners (CIBO)
Portland Cement Association (PCA)
The Aluminum Association (TAA)
The Fertilizer Institute (TFI)
Tile Council of North America (TCNA)

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List of Associations

American Iron and Steel Institute (AISI)
AISI serves as the voice of the North American steel industry in the public policy arena and advances the case for steel in the marketplace as the preferred material of choice. AISI is comprised of 21 producer member companies, including integrated and electric furnace steelmakers, located in 41 states, Canada and Mexico, as well as 120 associate members that are suppliers to or customers of the steel industry. The American steel industry employs more than 387,000 people and indirectly supports nearly two million jobs. Steel contributes more than $520 billion to the economy when considering the direct, indirect and related impacts.

American Petroleum Institute (API)
API is the only national trade association representing all facets of the oil and natural gas industry, which supports 10.3 million U.S. jobs and nearly 8 percent of the U.S. economy. API's more than 600 members include large integrated companies, as well as exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms. They provide most of the nation's energy and are backed by a growing grassroots movement of more than 40 million Americans.

Council of Industrial Boiler Owners (CIBO)
CIBO represents the interests of America's non-utility energy products and users. It is the organization of choice for advocacy and accurate information to achieve safe and cost-effective solutions for industrial energy, technology and environmental issues.

Portland Cement Association (PCA)
PCA is the leading voice for the U.S. cement manufacturing industry. Our members are responsible for more than 92 percent of the portland cement production capacity in the United States, and serve nearly every Congressional district. PCA conducts market development, engineering, research, education, technical assistance, and public affairs programs on behalf of its member companies. Our mission focuses on improving and expanding the quality and uses of cement and concrete, raising the quality of construction, and contributing to a better environment.

The Aluminum Association (TAA)
The Aluminum Association is the aluminum industry's voice in Washington, DC. Representing the entire aluminum value chain, it provides global standards, industry statistics and expert knowledge to member companies and policy makers nationwide. With deep engagement in public policy advocacy and technical forums, the Association is committed to advancing aluminum as the sustainable material of choice.

The Fertilizer Institute (TFI)
TFI is the leading voice of the fertilizer industry, acting as an advocate for fair regulation and legislation, a consistent source for trusted information and data, a networking agent, and an outlet to publicize industry initiatives in safety and environmental stewardship. Our Mission is to represent, promote and protect the fertilizer industry through strategic initiatives.

Tile Council of North America (TCNA)
TCNA is a not-for-profit trade association representing over 99 percent of the ceramic tile manufacturing capacity in the United States. In 2017, TCNA member companies shipped $1.4 billion of domestically-made tile. TCNA's 220 members include manufacturers of ceramic tile, tile installation materials, tile equipment, raw materials, and other tile-related products.

The Associations' Comments on EPA's Draft Guidance "Revised Policy [o]n Exclusions from 'Ambient Air'"

January 11, 2019

Table of Contents

1.0 Introduction

In November 2018, the U.S. Environmental Protection Agency (EPA) released a draft, "Revised Policy [o]n Exclusions from 'Ambient Air'" ("draft ambient air policy" or "draft guidance").[2] The Associations greatly appreciate the opportunity to comment on this draft guidance before EPA releases the policy in final form, and generally support efforts to better align EPA's ambient air policy with the regulatory definition. As currently constructed, the draft guidance clarifies EPA's position with respect to the meaning of "access," by recognizing sensible approaches already used in practice by some reviewing authorities. The final revised policy, however, should institute more meaningful reforms to align EPA's policy more closely with the regulatory definition and promote a more rationale application of the policy in implementation of the PSD permitting program. Below, the Associations highlight specific suggestions for revising the ambient air policy to better align the policy with the regulatory definition, properly characterize the nature of the guidance, and update the policy as it relates to reviewing authority discretion in conducting source impact analyses to satisfy the requirements under 40 CFR §52.21(k) of the PSD regulations.

2.0 Legal and Regulatory Background

EPA's draft guidance explains its existing ambient air policy in reference to a 1980 letter written to Senator Randolph ("1980 letter")[3] ("existing ambient air policy" or "existing guidance"). The "Introduction" to the draft guidance would benefit from additional information on the basis for EPA's definition and prior statements, because this information highlights the flexibility and discretion EPA and State regulatory agencies have for setting procedures to implement the regulatory definition in the context of PSD modeling analyses.

The Clean Air Act (CAA) uses the term "ambient air" numerous times, yet Congress provided no definition for the term. EPA first defined "ambient air" in 40 CFR § 50.1(e), in 1971[4], under the authority of the 1970 CAA.[5] It did so in a final rule, without first proposing the term and without any explanation for the definition it assigned. Subsequently, in the landmark case, *Train v. NRDC*, the Supreme Court described "ambient air" as the Clean Air Act's "term for the outdoor air *used by* the general public," (emphasis added).[6] With this decision, the Supreme Court recognized that not all atmosphere is ambient air, and that protected atmosphere is linked to general public exposure.

Very early on, EPA explained that "access" as used in the regulatory definition meant the right or ability to enter an area, and that the "general public" refers to the "community at large."[7] At

[2] U.S. Environmental Protection Agency (EPA), Nov. 2018.
[3] Letter from Douglas Costle, Administrator U.S. Environmental Protection Agency (EPA) to Jennings Randolph, Senator, Chairman for Committee on Environmental and Public Works, (Dec. 19, 1980).
[4] 36 *Fed. Reg.* 8186, (4/30/1971).
[5] (PL-91-640).
[6] 421 U.S. 60, (1975)
[7] *See* Memorandum of Law from Michael A. James, Attorney, Air Quality and Radiation Division, U.S. EPA to Jack Farmer, Chief, Plans Management Branch, SDID, U.S. EPA (Sept. 28, 1972).

that time, neither the CAA nor EPA's regulation expressly included the Prevention of Significant Deterioration (PSD) program.

EPA subsequently codified the PSD regulations without including a definition for "ambient air." Nevertheless, under § 52.21(k), the reviewing authority must determine whether a proposed emissions increase will cause or contribute to an exceedance of a National Ambient Air Quality Standard (NAAQS) or PSD increment in the air quality control region. It is in this context that the definition of "ambient air" became particularly relevant for performing a cause or contribute analysis.

Importantly, § 52.21(k) does not expressly require an analysis of *all* "ambient air" *per se,* or even require modeling to conduct a cause or contribute analysis. The use of modeling to satisfy § 52.21(k) requirements, and EPA's reliance on the definition of ambient air in § 50.1(e) to craft its policy for purposes of conducting a source impact analysis under § 52.21(k), all evolved through the non-regulatory concepts of "impact area," "modeling domain," and receptor placement. While often viewed as synonymous, nothing in the CAA nor EPA's rules compels an outcome that the PSD modeling domain encompass all areas of ambient air within the impact area. As discussed further below, there are relevant reasons to clearly demarcate the role of "ambient air" and "access" in performing a § 52.21(k) analysis.

Nevertheless, EPA began defining the modeling domain relative to ambient air outside of its regulatory definition. As articulated in the 1980 letter, EPA started 1) applying a broad view that public access exists unless a property contains physical barriers, such as a fence, and 2) intermingling the "stationary source" concepts of "ownership and control" into its ambient air policy, despite the fact that the definition of ambient air did not include such concepts.[8] As the Ninth Circuit rightly recognized, however, "[t]he essence of EPA's regulatory definition links ambient air to public access," and does not premise the definition on physical barriers or on ownership or control of land.[9] In this sense, EPA's existing ambient air policy is not an exclusion at all, but an *extra-regulatory* statement that has the effect of *expanding* the scope of its regulatory definition of "ambient air." This is because, EPA's existing guidance sets forth *additional* criteria, not found in the regulatory text, that when applied in practice results in classifying atmosphere as "ambient air," that otherwise might not qualify as such without consideration of these added criteria.

Notably, many state air pollution regulations do not include a definition of "ambient air," or contain definitions different from EPA's. In sum, EPA's ambient air policy as applied in the context of PSD modeling is neither compelled by the CAA, the ambient air definition in § 50.1(e), nor the PSD regulations, and is not binding on States. Because the CAA contains no expressed definition of ambient air, EPA and states have inherent authority to interpret the term consistent with the purposes and requirements of the CAA.

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[8] *Also see* Memorandum from Walter C. Barber, Office of Air Quality Planning and Standards to Gordon M. Rapier, air and Hazardous Materials Division, Region II, "Applicability of PSD Increments over Company property," May 23, 1977.

[9] *Resisting Environmental Destruction on Indigenous Lands, Redoil et al. v. US EPA*, 716 F.3d 1155 (9th Cir. 2013).

3.0 "Interpretation" vs. "Non-binding Policy"

A. Non-Binding Policy

EPA titles its draft guidance as policy rather than an interpretation of the regulatory term "ambient air." The Associations agree that nonbinding "policy" is the correct characterization of the contents of the guidance as it currently stands. The Associations request that EPA add a discussion to the final ambient air policy explaining the nature of the policy as guidance, and the implications of this reference.

B. Not an Exclusion

EPA tentatively titled its draft guidance "Revised Policy on Exclusions from 'Ambient Air'." This title is misleading in two respects. Currently, the policy statement relates to only one of EPA's identified "core" elements – "access." Thus, the statement does not include the totality of EPA's ambient air policy and the title misleads readers by implying that the guidance addresses broader aspects of the ambient air policy.

The title also improperly classifies the policy as an "exclusion." The term "exclusion" implies that without EPA's policy, the atmosphere "excluded" would fall within the ambient air definition but for application of the exclusion, and that the burden of proof falls on a source to justify application of the exclusion. In actuality, as previously explained, the existing ambient air policy expands, and does not limit, the regulatory definition of ambient air. "Access" is a core element of the definition which must be proven by a plaintiff before atmosphere would properly qualify as "ambient air" in the first instance. Accordingly, the draft ambient air policy (and any resulting final guidance) is not an "exclusion" or exemption at all and should not be referred to as such.

If EPA limits its final guidance to addressing only the "access" element, then the Associations recommend that EPA title the final guidance "Revised Policy for Implementing the 'Access' Element of the 'Ambient Air' Definition."

4.0 The Access Element

In setting forth its proposed revision to the "access" element of the ambient air policy, EPA divides the concept of access into two parts: practical and legal access. In this regard, EPA asserts that, as articulated in the 1980 letter, "land owned or controlled by the owner or operator" addresses the legal concept of access, and "precluded by fence or other physical barriers" addresses the practical concept of access. The draft ambient air policy proposes to revise the component of the statement addressing practical access, but to leave untouched the component addressing legal access.

Revision to the legal access component of the existing ambient air policy is also needed. As further described below, EPA's current interpretation of legal access unnecessarily broadens the ambient air definition, particularly in the context of industrial park developments and situations where the stationary source owner or operator may differ from the person who controls access to the land on which the stationary source is located. Accordingly, the Associations respectfully request that EPA revise both aspects of the existing ambient air policy.

A. Legal Access

Legal access concerns the right of a person to enter a given property. In legal terms, it is uncommon for the general public to have any legal right to enter private property unless the property is burdened by a public easement. Individuals entering property without permission of the owner are trespassers and no longer members of the general public.[10] Accordingly, the plain meaning of "to which the general public has access" within the regulatory definition of "ambient air" is properly interpreted not to include private property. EPA's 1980 letter, however, unnecessarily broadens the ambient air definition as applied in the PSD program by considering only property owned or controlled by the owner or operator of the stationary source. EPA admitted that such an approach is not compelled by the regulatory language, but one born of policy preference. "First, the ambient air definition is more complex than it appears, because the definition of 'general public' changes depending on the source being considered…which reflects a policy that OAQPS advocates.…"[11]

In 2007, EPA perpetuated this broadening of the "ambient air" definition in guidance addressing leased land within a larger area controlled by a lessor ("leased land guidance").[12] This leased land guidance illustrates the incongruity and complexity of applying EPA's current policy of "legal access" in practice. EPA examines four different lessee/lessor scenarios in the leased land guidance. In three of the scenarios, the general public has no legal or practical access to the land. And, in all three scenarios, the same workers and business invitees may have access to the land. Yet, EPA's leased land guidance creates different ambient air boundaries in the scenarios based on leasing agreements and stationary source concepts (such as contractual or operational relationships, as EPA interpreted the stationary source definition at that time). In each case, EPA unnecessarily defined ambient air relative to each entity's sphere of control, rather than the totality of controlled land. It also defined "general public" in relation to each entity and not in a more general context of the "community at large." The leased land guidance rests on flawed logic as the existence of contractual or operational relationships have nothing to do with defining the area of the land accessible to the "general public." Regardless of who employs worker A or B, both workers breathe the same air when located in the same location of the contiguous and

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[10] *See Black Law's Dictionary*, Eighth Edition, Thomson West (1999*)*(defining "trespasser" as "one who intentionally and without consent or privilege enters another's property, and "public" as "open or available for all to use, share or enjoy." At any rate, trespassing events occur very rarely and only for brief occasions. Thus, EPA may support not including the atmosphere breached by a trespasser within the ambient air definition based on the *de minimis* theory.

[11] S*ee* Memorandum from Darryl Tyler, Director Controls Program Development Division, U.S. EPA to Thomas Maslany, Chief Air Enforcement Branch, Region II, US EPA, "Applicability Determinations for Columbian Chemical Company," (Mar. 1985).

[12] *See* Memorandum from Stephen Page, Director Office of Air Quality Planning and Standards to Regional Air Division Directors, "Interpretation of 'Ambient Air' in Situations Involving Leased Land," (June 22, 2007).

adjacent property, and both workers remain protected by permissible exposure limits under the Occupational Safety and Health Administration (OSHA) standards.[13]

Nothing in the codified definition of "ambient air" compels such an interpretation, and EPA has not supported its leased land guidance (or other applications of the same interpretation) with any substantial discussion of its legal or policy rationale. Indeed, a core element of the ambient air definition - -"external to buildings"- - points to a more limited view of ambient air. The 1970 CAA defines a "stationary source" as a "*building*, structure, facility or installation," (emphasis added).[14] Thus, by EPA's own regulatory construction, "ambient air" is outside the boundaries of stationary sources, not within. Accordingly, EPA is not precluded from considering the totality of controlled, contiguous and adjacent property in defining the boundaries of ambient air.

There are strong policy considerations supporting such an interpretation that are consistent with zoning laws. One of the foremost purposes of the PSD program is to ensure economic growth in an environmentally responsible manner.[15] Land zoning regulations often designate contiguous and adjacent parcels in remote areas to promote industrial development that is separate from areas accessible to the general public such as neighborhoods and schools. Cost-effective and environmentally responsible supply chain management also dictate locating suppliers and manufacturers in close proximity. Treating each parcel in the area as publicly accessible lands instead of private property can discourage the type of development intended by these zoning laws, and instead promote dispersed development patterns that likely have greater, adverse environmental impacts (*e.g.*, increased transportation emissions, development of undeveloped land.) When one or more stationary source(s) control(s) access to the boundaries of contiguous and adjacent properties, then an effective barrier to general public access exists for the entirety of the land, and EPA's ambient air policy should recognize the air above such lands as non-ambient air.

Precedent for this view of the ambient air boundary exists in state toxic air pollutant regulations. For example, the MD Department of the Environment (MDE) requires new installations to evaluate the impact of increased emissions to determine whether the "premises" complies with State requirements. The MDE defines premises as "all the installations or other sources that are located on contiguous or adjacent property and that are under the control of one person or under common control of a group of persons."[16] In the case of a commercial park, the MDE interprets the word "premises" to encompass the entirety of the commercial park and, as a result, it has required applicants to model emissions impacts only at the boundary of the commercial park.[17]

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[13] OSHA has set concentration -based permissible exposure levels for NAAQS pollutants and precursors such as sulfur dioxide, nitrogen dioxide, ammonia, inorganic lead, carbon monoxide, and many of the compounds that comprise volatile organic compounds and particulate matter. Congress passed the Occupational Safety and Health Act in 1970 to ensure worker and workplace safety [29 U.S.C. §651 et seq. (1970)]. It is likely not a coincidence that EPA chose to use the term "general public" in its 1971 "ambient air" definition as it approximates the jurisdictional boundaries of OSHA authority to regulate the workplace.

[14] *See* Section 111(a)(2).

[15] 42 U.S.C. 7470

[16] COMAR 26.11.15.04A(2)

[17] The Maryland Court of appeals upheld MDE's position that the entire park is under the control of its landlord and thus the park satisfies the definition of "premises." *Md. Dep't of the Env't v. Shipley's Choice Homeowners' Ass'n, Inc.* (Md. App., 2016)(unreported). Upheld by *Kor-Ko Ltd. v. Md. Dep't of the Env't* (Md. App., 2017). Although petitioners specifically challenged MDE's interpretation of "premises" in light of EPA's ambient air definition, both

When the MDE set the screening levels for its standard, it expressly acknowledged that there may be several sources within a single premise. Likewise, the Louisiana Department of Environmental Quality (LDEQ) also does not apply state ambient air standards "to industrial properties adjacent to or impacted by emissions from a major source, provided the owner or operator of the major source demonstrates that worker protection standards enacted pursuant to the federal Occupational Safety and Health Act as permissible exposure limits will not be exceeded on the impacted property…"[18]

EPA also has recognized that the owner or operator of a stationary source may differ from the person who controls access to the land. In 2006, EPA determined that JM Products intended to serve as a land management company (the land was owned by a different third party) that would provide infrastructure support (*e.g.,* roads, sound barriers, water), and would not own or control the portable rock crushers and hot-mix asphalt sources (the stationary sources) that would locate at the site. EPA did not address the "ambient air" in this decision, but the determination, nonetheless, exemplifies EPA's ability to differentiate between the entity controlling land access and the owner or operator of the stationary source.[19] Such a scenario is very common for oil and gas development, where leased production sites are part of a larger parcel of land owned and controlled by an entity other than the production source.

As EPA acknowledges in the draft guidance, EPA applies a broader interpretation of legal access when permitting Outer Continental Shelf (OCS) sources. EPA considers controlled access, outside the ownership and boundaries of the stationary sources, when defining the ambient air boundary for PSD permitting of OCS sources. In 2007, Region 2, for example, agreed that an area outside the stationary source boundary qualified as non-ambient area for an offshore LNG facility.[20] In this case, EPA allowed the Coast Guard-patrolled safety zone to serve as the ambient air boundary. EPA allowed this approach again for permits issued to Shell Gulf of Mexico, Inc. and Shell Offshore Inc. These later permits withstood challenges both to the EAB and the Ninth Circuit.

Finally, the recent EAB decision in *Palmdale Energy* highlights the ambiguity and complexity caused by inclusion of ownership and stationary source considerations in ambient air boundary decisions.[21] There, a conservation group challenged Region 9's decision to exclude modeling receptors from property adjacent to the applicant's property (referred to as Plant 42) from some modeling analyses. While advocating that it followed EPA ambient air policies, Region 9 also based its decision on a finding that "Plant 42 is not open for public access," even though four separate owners control use of the totality of the property.[22] The EAB upheld Region 9's decision.

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the Special Court of Appeals and the Court of Appeals found that EPA's "ambient air" definition was inapplicable to the Maryland regulations. The Courts found that MDE set the allowable emissions levels in view of its interpretation of "premises."

[18] LAC 33:III.5109.B.2

[19] *See* letter from Pamela Blakely, Chief Air Permits Section, Region 5 to John Mayer, Sept. 20, 2006.

[20] *See* letter from Steven C. Riva, Chief Permitting Section, Region 2, to Leon Sedefian, NY DEC, Oct. 9, 2007.

[21] *See In re: Palmdale Energy, LLC's,* PSD Appeal No. 18-01, (Oct. 23, 2018).

[22] *Id.* The EAB found that petitioners failed to preserve issues related to "ambient air" for review and made no formal determination with respect the Region's approach.

As these cases illustrate, EPA's existing ambient air policy creates unnecessary complexity by equating legal access with the owner or operator of the stationary source. Rather than perpetuating a position which requires reviewing authorities to develop a myriad of explanations or exceptions to justify not following the ambient air policy in numerous case-by-case decisions, EPA should instead focus the policy on assuring that ambient air includes areas where the "community at large" has practical access and actual risks of exposure. In sum, EPA should remove the phrase, "the exemption from ambient air is available only for the atmosphere over land owned or controlled by the source" from its final ambient air policy because it is not compelled by the regulatory definition, is not necessary to protect public health or welfare, runs counter to responsible land use regulations, and creates the need for complex and time-consuming case-by-case determinations. Instead, EPA should focus its policy on practical access because this aspect of "access" remains a substantively important consideration with respect to protecting public health and welfare from adverse effects.[23]

B. Practical Access

The Associations agree with EPA's assessment that revision to the existing ambient air policy is necessary to recognize the "advances in technology and greater experience in a variety of ambient air scenarios…"[24] The Associations also agree that "effectiveness" means that a measure provides "reasonable assurance" that the general public may not access property, rather than proof of 100% preclusion. Notwithstanding a strong support for the Agency's general approach, the Associations recommend changes to the actual language proposed in the draft ambient air policy.

As crafted, the proposed language would recognize "measures" only if they are "employed" by the owner or operator. Some measures simply exist, such as geographical barriers, and need not be put into place by an owner or operator to create an effective bar to access. Other measures may be implemented by others, but have the effect of limiting access to an owner or operator's property. The Associations recommend that the entirety of the existing policy be revised to state:

> ~~*It is appropriate to ex*~~*Ambient air does not in**clude the atmosphere over contiguous or adjacent property* ~~*land owned or controlled by the stationary source, whenre the owner or operator of the source employs*~~ *measures or conditions, which may include physical or geographical barriers,* ~~*that are*~~ *effectively* ~~*in deterring*~~ *or preclude*~~*ing*~~ *access to the land by the general public.*

5.0 Railways, Roadway, and Waterways

Railways, roadways, or waterways often run through contiguous or adjacent private property. The Associations ask that EPA include additional discussion on access as it relates to these

[23] While protection of public health and welfare is also a goal of the PSD program, non-public workers and business invitees remain protected under the jurisdiction of the Occupational Health and Safety Administration, and other federal, state, and local regulatory agencies.
[24] Draft ambient air policy at 5.

property features and recognize that there are circumstances where general public access to these areas are effectively precluded.

Under the existing ambient air policy, atmosphere above railways, roadways, and waterways are sometimes considered accessible to the general public by default when they are not owned by the stationary source. Arguably, such default assumptions are not appropriate and these areas should qualify as non-ambient air when the general public lacks "practical access." EPA's final guidance must clarify that general public access can be effectively precluded to railways, roadways, and waterways, irrespective of ownership, through the use of such effective measures as travel restrictions, signage, and other measures. For example, when a road or railway dead-ends within the property boundary and a facility controls the traffic into and out of the facility, general public access is precluded. LDEQ, for example, specifically recognizes these principles in its modeling guidance.[25]

A "through" line, likewise, does not allow general public access if posted signs prohibit stopping along the line. Finally, a waterway precludes general public access when, for example, a documented security measure, such as a 500-m exclusion zone around a docking facility, controls access. This type of sensible approach is already being recognized by some states. LDEQ, for example, also excludes atmosphere above "roads, railroads, or water bodies, or other areas where activities are transient in nature and long-term exposure to emissions is not reasonably anticipated" from regulation under its state ambient air standards. [26]

6.0 Ambient Air and Access in Modeling Policies

EPA should include a discussion on "access" as it relates to modeling in the final ambient air policy revision. As explained earlier, previous EPA and Regional office staff often unequivocally equate the modeling domain and required receptor placement in PSD modeling with EPA's policy for ambient air. For example, in EPA's 1-hour SO_2 Modeling Technical Assistance Document, EPA states, "[f]or applications such as SIP, PSD, and NSR, receptors should be placed in areas that are considered ambient air (*i.e.* where the public generally has access)."[27]

There is no explicit basis for this in the regulatory definition of "ambient air" or in EPA's Appendix W Guideline on Air Quality Models.[28] Moreover, Appendix W is riddled with language indicating that its procedures are "guidance" and "recommendations" and that states

[25] *See* "Air Quality Modeling Procedures," LDEQ, Air Quality Assessment Division, (Aug. 2006)(e.g. public railroads "… does not include rail spurs that are only accessible by the applicant facility.").
[26] LAC 33:III.5109.B.1
[27] *See* "SO_2 NAAQS Designations Modeling Technical Assistance Document, DRAFT," Office of Air and Radiation, US EPA (Aug. 2016)
[28] 40 C.F.R. Part 51, Appendix W.

retain implementation discretion.[29] EPA and the EAB have acknowledged as much.[30] Yet, fear of being second guessed by EPA prevents many states from making common sense decisions about model receptor locations.

EPA applies probabilistic decision-making in siting monitors and modeling for NAAQS compliance. For example, EPA recently revised its minimum monitoring requirements for near-road NO_2 monitoring. EPA found that, "[c]urrent near-road NO_2 monitoring data indicate air quality levels in the near-road environment are well below the National Ambient Air Quality Standard (NAAQS) for NO_2."[31] Based on population and traffic patterns, EPA determined that monitoring for NAAQS compliance in near-road areas with populations less than 1 million persons was not necessary, and generally stated that monitoring should occur in areas of potential exposure to "susceptible and vulnerable populations."[32]

In EPA's draft 1-hour SO_2 Modeling Technical Assistance Document (for modeling to determine air quality for purposes of designations), EPA recommended that modeling receptors be placed only in areas where it is feasible to place a monitor (instead of all ambient air locations). Under this strategy, receptors need not be placed in water bodies since it is not feasible to monitor in those locations. EPA reasoned that "for the purposes of modeling for SO_2 designations, the receptor placement strategy can differ from SIP, PSD or NSR, since the modeling is acting as a surrogate to monitoring."[33] EPA explained that the purpose of the modeling is to characterize "existing air quality rather than [to perform] analyses of emission limits necessary to provide for attainment."[34] This reasoning, however, fails to articulate a meaningful distinction for disallowing a probability-based decision framework for determining receptor placement in PSD modeling demonstrations.

Both CAA §§ 160(4) and 165 create obligations to assure that emissions increases from a source will not exceed air quality values *in reference to* the "applicable implementation plan" and "air quality control region."[35] If designation of an area for nonattainment with a NAAQS is based on a monitoring network or modeling with receptors generally located to measure exposure to "susceptible and vulnerable populations," and attainment with a NAAQS is based on design values measured from monitoring stations generally not located on private lands owned by stationary sources or on waterbodies, then it stands to reason that a demonstration under

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[29] In January 2017, EPA issued a final rule revising Appendix W. *See* 82 *Fed. Reg.* 5182 (Jan. 17, 2017). This final rule includes some provisions as recommendations, and some as requirements. The recommendations are expressed in non-mandatory language. For instance, the *Guideline* frequently uses 'should' and 'may' rather than 'shall' and 'must.'"

[30] *See In Re Prairie State Generating Company,* 13 E.A.D. 1, 99 (EAB 2005) ("Although Appendix W has been promulgated as codified regulatory text, Appendix W provides permit issuers broad latitude and considerable flexibility in application of air quality modeling. Appendix W is replete with references to 'recommendations,' 'guidelines,' and reviewing authority discretion." Internal citations omitted).

[31] FACT SHEET "Revisions to the Near-road Minimum Monitoring Requirements," (available at: https://www.epa.gov/sites/production/files/2016-12/documents/fact_sheet_-_nr_no2_final_rule_12-23-16_final.pdf)

[32] *Id.*

[33] US EPA, 2016.

[34] *Id*.

[35] 42 U.S.C. 7470 and 7475.

§52.21(k) need not necessarily entail a greater level of analysis to satisfy the cause or contribute demonstration. Receptor placement protocols should disregard *de minimis* exposures[36] and correlate with real-world exposures to produce realistic and scientifically supportable results.[37] Accordingly, if general public or welfare exposures are not reasonably expected to occur at a specified location, or at least not occur for the frequency and averaging time of the NAAQS, then there are no adverse impacts to model in the specified location, and requiring an applicant to conduct such an analysis does not properly align the analysis with the way in which states demonstrate NAAQS compliance under the applicable implementation plan.

EPA's final guidance should recognize that a "one-size fits all" for defining receptor location based on locations of "ambient air" is unreasonable and obsolete given the new probabilistic form of the recent NAAQS standards. EPA should acknowledge that the decision as to what atmosphere qualifies as "ambient air" may influence, but remains separate and apart from, decisions related to the appropriate modeling domain and receptor placement to satisfy the demonstration required by § 52.21(k).[38] Different receptors may be modeled for different averaging periods based on a reasonable assessment of "access" that is consistent with the averaging period and form of the standard. Traffic patterns, populations, and the industrial nature of the area, and locations of "susceptible and vulnerable" populations are relevant considerations. Reviewing authorities retain discretion to account for site-specific circumstances and receptors need not be placed to simulate air pollutant concentrations in areas where natural, man-made, or jurisdictional barriers or hazards preclude the potential for general public exposure at a given location with the frequency or averaging time specified for the NAAQS or PSD increment that is under evaluation, even if such areas may qualify as ambient air.

7.0 Conclusion

The Associations appreciate the opportunity to comment on EPA's draft ambient air policy. The Associations urge EPA to eliminate unnecessary complexities in applying the ambient air policy by removing the concepts of ownership, control and stationary source from the policy statement, and instead focusing the policy on the relevant element of practical access. EPA should not limit "practical access" to considering only "measures" "employed" by the source, and should expand the discussion to address railways, roadways, and waterways. Given the new probabilistic form of the NAAQS, EPA also should expand the guidance to affirm a reviewing authority's discretion to consider ambient air and access issues in PSD modeling, in light of the averaging

[36] *See* Page, 2007 (stating that an annual fair or "infrequent family or community-oriented event" such as a "picnic" would not create "ambient air" based on "de minimis levels of public access."). We suggest a similar logic for modeling receptor placement.

[37] *See Sierra Club v. Wyo. Dep't of Envtl. Quality*, 2011 WY 42 (Wyoming 2011) (affirming DEQ's decision not to model short-term fugitive particulate matter impacts with AERMOD because "such models 'do not produce realistic results' and can significantly overestimate short-term impacts."). *Sierra Club v. United States DOT*, 310 F. Supp. 2d 1168, 1188 (D. Nev. 2004) ("FHWA does not act arbitrarily and capriciously by not evaluating a project-specific impact for which the then-current scientific modeling and available information could not provide meaningful findings on which to base a decision."); *Duke City Lumber Co. v. New Mexico Envt'l. Improvement Bd.*, 102 N.M. 8, 10 (New Mexico 1984) (requiring a "rational basis" for the reliability of modeling studies).

[38] Access issues and using probabilistic decision-making for determining receptor placement are relevant to modeling for attainment demonstrations and NAAQS compliance as well.

time and form of the NAAQS. Finally, EPA should explain the nonbinding nature of the policy and correct the title to recognize that the policy is not an exclusion. These changes would better conform the policy to the existing regulatory text and align the policy with the goal of protecting public health and welfare while ensuring economic growth occurs consistent with environmental protection.

Ambient Air Comment: Record No. 27

Submitted on 01/11/2019 10:54AM
Submitted values are:

First Name: Jon
Last Name: Mauchmar
Organization: Little Traverse Bay Bands of Odawa Indians
Comment:
Little Traverse Bay Bands of Odawa Indians
7500 Odawa Circle
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12/21/18

US Environmental Protection Agency
Office of Air and Radiation
Mail Code 6101A
1200 Pennsylvania Avenue NW
Washington, DC 20460

RE: Revised Policy on Exclusions from "Ambient Air"

To Whom It May Concern:

The Little Traverse Bay Bands of Odawa Indians (LTBB) is pleased to submit these comments on EPA's draft guidance titled "Revised Policy on Exclusion from Ambient Air."

On Sept. 21, 1994, the Little Traverse Bay Bands of Odawa Indians (LTBB) was federally reaffirmed with the signing of Public Law 103-324. The Tribe is governed by a nine member Tribal Council who serve staggered terms. The Tribe has over 4,000 members with a large number living within Charlevoix and Emmet Counties. LTBB presently employs over 100 full and part-time employees. The historically delineated reservation area, located in the north-western part of Michigan's Lower Peninsula, encompasses approximately 336 square miles of land within the two counties. The largest communities within the reservation boundaries are Petoskey, Harbor Springs, and Charlevoix.

Substantive Policy Issues

LTBB anticipates that this proposal would allow sources of air pollution to expand the amount of area around each source that is exempted from ambient air, thus limiting the detection of the sources' air pollution and bypassing violations of the NAAQS that the source may have caused under the previous policy. As no data is available to inform the effects we can expect here, this increase in pollution and the scale of its effects is currently unquantifiable.

Native Americans use the land in traditional ways including hunting, fishing, and gathering to a greater extent and duration than the average American.
Additionally, air quality impacts hunting, fishing, and gathering rights of Tribes in Ceded Territories. We expect this proposed policy will negatively affect the treaty rights of Tribes to continue to sustain

themselves by accessing resources on ceded lands across the United States. Also, many wildlife species that can be excluded with fences will wander between non-ambient and ambient air areas.

We also question the necessity of this action. Reversing longstanding policy should only be done for good reason and after careful analysis. Removing the fencing requirement would eliminate the existing bright line rule, which is far easier to implement than the nebulous and ad hoc considerations EPA and industry will need to engage in under the revised policy. Fences are clear and simple markers of boundaries and they provide a common sense, easily verifiable border for determining what is "ambient air."

Infrastructure costs may follow on this policy change. If an agency or sources have set up monitoring equipment at the edge of the current ambient air for the source, that equipment must likely be moved and recalibrated.
LTBB requests an assessment of this matter and analysis of costs.

Procedural Concerns

EPA has released only a brief policy and legal document with no technical, staff-level analysis of its impacts on the environment or on the costs and benefits of this policy decision. We acknowledge that this agency action is not a regulation, which would trigger sufficient environmental review and Executive Order 12866 costs and benefits analysis, this policy revision nevertheless will alter how air emissions and violations of the NAAQS are measured across the nation. We believe EPA's proposed revision amounts to a major agency action with a significant effect on the human environment and therefore EPA should engage in some form of environmental analysis of the issue. Until then, the public, including LTBB, are almost completely uninformed about the implications of this action.

Conclusion

We oppose EPA's proposed action and request that the agency maintain the longstanding interpretation without changes. If EPA chooses to move forward with this policymaking process, we ask that the agency take a measured look at the impacts of its decision and ensure it agrees with the CAA's language and purpose. EPA should perform the environmental analysis that would be required under the Clean Air Act for a rulemaking procedure and the social costs and economic analysis that would be performed in a Regulatory Impact Analysis. The agency should then release this information in a second period of public review and comment to inform the agency, tribes, and general public regarding the impacts of this action.

LTBB appreciates this opportunity to comment on the draft "Revised Policy on Exclusion from Ambient Air."

If you have any questions or seek clarification from LTBB, please contact Jon Mauchmar at (231) 242-1578 or jmauchmar@ltbbodawa-nsn.gov.

Sincerely,

Jonathan Mauchmar
Little Traverse Bay Bands of Odawa Indians Environmental Specialist

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Nez Perce

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January 11, 2019

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RE: Revised Policy on Exclusions from "Ambient Air"

To Whom It May Concern:

The Nez Perce Tribe's Air Quality Program is submitting these staff-level comments on EPA's November 2018 draft guidance titled "Revised Policy on Exclusions from 'Ambient Air'." These are staff-level comments only and are not official comments from the Nez Perce Tribe.

EPA is revisiting its longstanding interpretation of "ambient air," defined in 40 C.F.R. § 50.1(e) as "the atmosphere, external to buildings, to which the general public has access." This regulatory definition, and EPA's interpretation of the term, is of key importance in implementing the Clean Air Act (CAA) because the statute, while using the term "ambient air" as part of the foundations of U.S. air regulation, provides no definition for the term. The core purpose of the CAA is to prevent pollution of ambient air to protect the public health and welfare, and one of the fundamental strategies the Act uses to reach this goal is the mandate to achieve and maintain National Ambient Air Quality Standards (NAAQS). In turn, those ambient air standards dictate State and Tribal Implementation Plan provisions, and are implemented through most of the major programs under the Act. *See, e.g.*, 40 C.F.R part 60 (New Source Performance Standards repeatedly use the term ambient air in setting limitations for all source categories); 40 C.F.R. part 51, subpart I (New Source Review and Prevention of Significant Deterioration programs' purpose is to attain and maintain the ambient air standards). Considering the fundamental importance of the term and the nearly forty years of consistent interpretation by EPA, we have a number of concerns regarding the agency's proposed change in policy.

First, we wish to share certain substantive concerns, including the potential negative impacts to health and welfare that would result from this reinterpretation in and near Indian Country. Second, we believe the process EPA has followed here is entirely insufficient to inform the agency and the public regarding this major change in policy and its impacts on the people and the environment. Based on these concerns, we oppose this revision to policy and ask that EPA

retain its longstanding approach. In the alternative, should the agency choose to move forward, we ask that the agency perform the analysis needed to support its decision-making process, and postpone final action until EPA, the Tribes, and the public have the opportunity to consider fully the impacts of this action.

Substantive Policy Issues

This proposal would allow sources of air pollution to expand the amount of area around each source that is exempted from ambient air. This would effectively reduce the area to be included for modeling and analyzing air emission impacts for permit considerations and, for NAAQS requirements, would bypass violations of that the source may have otherwise caused under the previous policy. We are concerned about the effect this potential increase in air pollution will have on the health and welfare of indigenous peoples throughout the United States. In addition, as discussed in greater depth regarding our procedural concerns, because no data is available to inform the effects we can expect here, this increase in pollution and the scale of its effects is currently unquantifiable.

We expect the removal of the fencing requirement from EPA's understanding of ambient air to have disproportionate impacts on Tribes. Native Americans use the land in traditional ways, including hunting, fishing, gathering, and pastoralism, to a greater extent and with greater duration than the average American. Additionally, air quality impacts these same traditional rights of Tribes in Ceded and Usual and Accustomed Territories, lands that Tribes transferred to the federal government in exchange for off-reservation rights by a treaty agreement. We expect this proposed policy will negatively affect the treaty rights of Tribes to continue to sustain themselves by accessing resources on lands across the United States and would cause Native Americans to experience greater exposure to pollution than most Americans.

We also question the necessity of this action. Reversing longstanding policy should only be done for good reason and after careful analysis. Should sources need an exception to the fencing requirement due to unusual circumstances, they may already receive one under EPA's existing interpretation. For example, EPA has applied a rule of reason and granted exceptions where terrain makes fencing difficult but effectively excludes the general public. *See* EPA, AMBIENT AIR REVIEW TEAM OVERVIEW at 11, http://www.cleanairinfo.com/regionalstatelocalmodelingworkshop/archive/2017/Presentations/2-6_2017_RSL-AART.pdf (case study of Audubon Material (a.k.a. Central Plains Cement) ambient air analysis in which EPA determined terrain was sufficient to preclude access). EPA points out this flexibility in the revised policy's discussion of *REDOIL v. EPA*. 716 F.3d 1155 (9th Cir. 2012). The agency was confronted with how to set ambient air boundaries for an offshore oil and gas drillship, and chose to use the Coast Guard's 500-meter effective safety zone around the ship at sea as a substitute for fencing, a common sense decision that was upheld by the Ninth Circuit. *Id.* at 1159, 1165. *REDOIL* demonstrates the flexibility to address unusual circumstances in EPA's existing understanding of "ambient air." While EPA uses *REDOIL* to support removing the fencing exception, we read it as support for retaining the fencing requirement in addition to the existing flexibility EPA already applies. Fencing isn't practical over water; the necessity of an exception in that specific case does not justify altering the rule for every other instance.

Procedural and Transparency Concerns

The rationale for EPA's action is not clear. Our substantive concerns are aggravated by the lack of information and analysis available on this matter. EPA has released only a brief draft policy with no technical, staff-level analysis of its impacts on the environment or on the costs and benefits of this policy decision. The two key policy documents which EPA relies on, the 1980 letter from Administrator Costle and the 2007 Stephen Page memorandum, were not provided.

EPA's draft document also includes numerous statements referring to input from "stakeholders" as justification to support this revised policy, however there is no identification of which interests these "stakeholders" represent nor is there reference to any record or documentation of the "stakeholder" input. Without a clear understanding of whom these "stakeholders" are that are requesting this change, one cannot conduct a well-informed analysis of the proposed policy change and its associated benefits and costs.

While we acknowledge that this agency action is not a regulation, which would trigger sufficient environmental review and Executive Order 12866 costs and benefits analysis, this policy revision nevertheless will alter how air emissions and violations of the NAAQS are modeled and measured across the nation. We believe EPA's proposed revision amounts to a major agency action with a significant effect on the human environment, and therefore EPA should engage in some form of environmental cost/benefit analysis of the issue. Reasoned and systematic environmental analysis is called for here, and the agency should conduct this work to inform its decision and the public appropriately.

Conclusion

EPA's current approach is not broken, and we see no need for the agency to provide a fix. We believe that EPA's longstanding approach should be maintained, and we strongly oppose EPA's proposed policy change and request that the agency maintain the longstanding interpretation without changes.

In the alternative, if EPA chooses to move forward with this policymaking process, we ask that the agency take a careful, measured look at the impacts of its decision and at what measures are consistent with the Act's language and purpose: to protect the public health and welfare by achieving and maintaining clean ambient air. To achieve this, the agency should perform the environmental analysis that would be required under the Clean Air Act for a rulemaking procedure, and the social costs and economic analysis that would be performed in a Regulatory Impact Analysis. This standard analytical approach to issues of national import is needed to address this significant policy change. The agency should then release this information in a second period of public review and comment to inform tribes, states, and the general public regarding the impacts of this action.

In closing, the current interpretation of ambient air is based on a successful 40-year precedent and clear implementation, and the Nez Perce Tribe's Air Quality Program therefore strongly

opposes the finalization of this policy. As noted in the beginning of this comment letter, these are staff-level comments only and are not official comments from the Nez Perce Tribe.

If you have any questions or seek clarification, I can be contacted at 208-621-3818 or julies@nezperce.org.

Signed,

Julie D. Simpson
Air Quality Program Coordinator

Harold P. Wimmer
National President and
CEO

January 11, 2019

The Honorable Andrew Wheeler,
Acting Administrator
U.S. Environmental Protection Agency

1200 Pennsylvania Avenue, NW
Washington, DC 20640
Submitted via Ambient_Air_Guidance@epa.gov.

RE: Comments on EPA's Proposed Revised Policy on Exclusions from "Ambient Air"

Dear Acting Administrator Wheeler:

The American Lung Association appreciates the opportunity to submit comments on EPA's draft of the "Revised Policy on Exclusions from 'Ambient Air'." The Lung Association opposes the proposed weakening of the policy defining "ambient air."

The American Lung Association is the leading organization working to save lives by improving lung health and preventing lung disease, through research, education and advocacy. During our 115-year history, we have fought hard to improve the air we breathe and to reduce the burden of lung disease on individuals and their families.

The air we breathe is essential to life and to reducing the burden of lung disease. The quality of the air we breathe outdoors affects each of us, including millions who face greater risks from unhealthy air. Unfortunately, with this proposal, EPA would severely weaken some key long-standing protections and permit more air pollution to threaten the health of the public.

Protecting human health from pollution in the air we breathe –ambient air—is the cornerstone of the Clean Air Act. As the Act defines it, the primary purpose of the law is "to protect and enhance the quality of the Nation's air resources so as to promote the public health." [42 U.S.C. §4201(b)]. The law requires EPA to establish specific, enforceable limits on pollution in ambient air—the National Ambient Air Quality Standards—as

one of many tools to protect the health of Americans from what the Act recognized even then as "mounting dangers to the public health and welfare." [42 U.S.C. §4201(a)].

Unhealthy air continues to harm the public health and even can threaten life itself. Emissions from utilities, industrial, commercial and other stationary sources can harm the health and threaten the lives of those who live near these facilities, as well as those who live far away. Many of those who live near such facilities are those who face greater risk because they are The Lung Association has urged EPA repeatedly to take steps to reduce those emissions and protect American lives and health.

Under its regulatory responsibility, EPA defined ambient air as "that portion of the atmosphere, external to buildings, to which the general public has access." [40 CFR 50.1 (e)]. Since 1980, EPA has added clarification to that requirement, as expressed in a letter from Administrator Douglas M. Costle to Senator Jennings Randolph. That "Costle letter" added language that has been used since then to reflect EPA policy, according to EPA, adding that "the exemption from ambient air is available only for the atmosphere over land owned or controlled by the source and to which public access is precluded by a fence or other physical barriers." (Costle, 1980).

EPA acknowledges that it has historically used this interpretation to call for a substantive physical barrier that would restrict unauthorized access to the facility. The Costle letter is cited in the draft policy revision and has been frequently cited in EPA responses to questions following guidance, particularly in a June 2007 memo from Stephen Page, Director of the Office of Air Quality Planning & Standards. (Page, 2007). For example, in a letter on a boundary question in an Alaska project, the EPA Region 10 office repeatedly explained that EPA requires a "fence or other physical barrier." (Helm, 2007).

EPA's long-standing definition has flaws, as pointed out in a 1989 General Accounting Office report "Air Pollution: EPA's Ambient Air Policy Results in Additional Pollution" (GAO, 1989). The report finds that EPA had reached differing decisions based on that definition, and that had allowed increased emissions. The GAO cited several examples when EPA accepted industrial efforts to acquire additional land to exempt those facilities from the requirements faced as ambient air. The GAO concluded that "EPA's ambient air policy allows the exclusion of large tracts of company-controlled land from the requirements of the Clean Air Act." The GAO urged EPA to "initiate a formal rulemaking process to redefine ambient air in a manner that is more protective of the environment." (GAO, 1989). However, EPA did not follow that recommendation.

This American Lung Association supports a broader, more protective definition of "ambient air" in keeping with the stated intent of the Clean Air Act and with our own adopted policy that "All people are entitled to breathe healthy air and to be free of the adverse effects of indoor and outdoor air pollution." (American Lung Association, 2016). The dictionary defines "ambient" as "existing or present on all sides," or, medically, "surrounding on all sides"; neither definition bears any relationship to beginning at a fence across a field (Merriam-Webster, 2019). The air that an employee or contractor, delivery person, or spouse dropping off an employee breathes when outside of the facility is ambient air. These individuals deserve protection from the harm present in any pollution outdoors.

Unfortunately, EPA now seems prepared to further weaken the historic definition and reverse decades of policy for no defined, much less health-protective reason. EPA offers no explicit rationale for this change. EPA argues that less obvious or invisible barriers, such as "video surveillance and monitoring, clear signage, routine security patrols, drones and other potential future technologies" would adequately define the boundaries of the facility and the "ambient air" outside its reach. (Proposed revision, 5). Scavenging for justification, EPA cites a Ninth Circuit U.S. Court of Appeals decision in 2012, where the court allowed a drilling project in Alaska to avoid a fence. EPA minimizes the fact that the facility had a clear boundary in the water of the Arctic Ocean that lay next to the facility.

These options fail basic tests. These options would not prevent access. Unlike the requirement in the Costle letter, these options would not "preclude" access and likely would not even "deter" access, as EPA incorrectly claims in the proposal. Many of these alternative systems would be impossible to monitor by any state, local governments or tribes. A facility says it will operate a drone to provide a boundary, yet how would any state or local government know if the drone was working, much less working effectively? While EPA recognizes that fences can be crossed, they propose systems like "clear signage" that are even more easily bypassed. As with the current requirements, the states, local governments and tribes will need to assess each plan, while losing the stronger, simple tools that EPA has historically provided as a backstop. Their work would be much harder.

This proposal also fundamentally erodes protections available to the public even under the current approach by weakening the monitoring and modeling of some of the nation's most dangerous air pollutants. Historically, EPA has required states and local governments to locate monitors adjacent to such a facility to assess how polluted the ambient air is. The monitoring allows tracking to protect the public from the emissions and develop appropriate modeling to ensure compliance with the state implementation plans required under specific National Ambient Air Quality Standards. Accurate measurement, modeling and assessment of criteria NAAQS such as sulfur dioxide and lead require accurate monitoring and modeling of major sources of these emissions.

The boundaries matter. Millions of Americans live or work near such facilities. Untold numbers of others routinely visit these facilities in their roles as mail carrier or contract worker. EPA estimates that more than 3.3 million people live in a nonattainment area for sulfur dioxide, based on the 2010 NAAQS. More than 9.5 million live in areas currently in nonattainment for lead. (Green Book, 2018). The opportunity for a source to expand its area exempted from ambient air standards, increasing the likelihood that the facility would increase emissions.

Ignoring the reality of how to limit access for a facility would reduce the protection for those who live and work downwind of such a facility. Allowing a facility to carve out more land that does not count as "ambient" would open the door for them to spew more pollution into the air.

The American Lung Association urges EPA to withdraw the proposed policy document and to reject the practice of making significant regulatory changes outside of the established notice and comment rulemaking process. Further, if EPA determines to proceed with a redefinition of "ambient air," the Lung Association requests that EPA undertakes a full analysis of the public

health impacts of this change complete with review by the Science Advisory Board and public notice and comment process.

Sincerely,

Deborah P. Brown
Chief Mission Officer
American Lung Association

References

American Lung Association. 2016. Public Policy Position: Healthy Air. February 27, 2016.

Letter from EPA Administrator Douglas Costle to Senator Jennings Randolph, Chairman, Committee on Environment and Public Works, December 19, 1980

Letter from Nancy Helm, Federal and Designated Air Programs, EPA Region 10, to John Kuterbach, Alaska Department of Environmental Quality. September 11, 2007. Re: Determining the Ambient Air Boundary for Potential Permit Application in Support of Alaska Industrial Development and Export Authority's Restart of Healy Clean Coal Project.

Letter from Donald Toensing, Chief Air Permitting and Compliance Branch, to W. Clark Smith, Nebraska Department of Environmental Quality. Interpretation of Ambient Air. August 1, 2000.

Memorandum from Stephen D. Page, Director, Office of Air Quality Planning & Standards to the Regional Air Division Directors. June 22, 2007. Subject: Interpretation of "Ambient Air" in Situations Involving Leased Land Under the Regulations for Prevention of Significant Deterioration.

U.S. Environmental Protection Agency. 2018. Nonattainment Areas for Criteria Pollutants (Green Book). Updated to December 31, 2018.

U.S. General Accounting Office. 1989. GAO/RCED-89-144, Air Pollution: EPA's Ambient Air Policy Results in Additional Pollution.

NEDA CAP
CLEAN AIR PROJECT
The National Environmental Development Association's Clean Air Project

January 11, 2019

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Re: Comments on Draft Revised Policy on Exclusions from "Ambient Air"

Dear Sir or Madam,

Introduction - The "National Environmental Development Association's Clean Air Project (NEDA/CAP) is pleased to have an opportunity to provide comments on OAR's Draft Revised Policy on Exclusions from "Ambient Air." NEDA/CAP's members are manufacturers that are subject to PSD/NSR permitting. Hence EPA's interpretation of the definition of "ambient air" is significant to them because it determines how potential future emissions are modeled for purposes of obtaining a PSD/NSR permit to construct a new major source or major modification of an existing major source. Ambient air dispersion modeling issues, including those associated with attainment of the National Ambient Air Quality Standards (NAAQS), which are embedded in the PSD permitting requirements, have become increasingly problematic as the NAAQS have become more and more stringent.

General Comment - Generally, NEDA/CAP appreciates EPA's confirmation of many state and local air pollution control agencies' recognition that modern technologies as well as a variety of natural and physical barriers are capable of excluding the public from a facility's property. This revised guidance will provide confidence to permit authorities and permit applicants on issues associated with identifying potential receptors when conducting PSD/NSR modeling. Clearly, EPA's 2018 updated interpretation of exclusions to "ambient air" is important for recognizing how companies can adequately and safely exclude the public from entering onto property which they own and on which they operate.

Administrator Costle's general guidance on implementation of the regulatory definition of "ambient air" with regard to the conditions for proscribing access to a facility's property was reasonably prescient 40 years ago, but does little to envision modern technologies' (remotely-operated cameras with wireless signals, motion detectors, drones, etc.) ability to proscribe public entrance on a source's property four decades after he first articulated it to the Senate Committee on Environment and Public Works. Further, it likely was not possible for the Administrator in

1980 to imagine how air dispersion modeling could be utilized as a blunt instrument to inhibit growth in an era of much more stringent NAAQS.

NEDA/CAP discusses the validity of EPA's 2018 interpretation of "ambient air," and its limitations below. Lastly, NEDA/CAP provides some thoughts about how these limitations could be addressed without any potential harm to public health.

1. EPA's Interpretation of the Term "Ambient Air" is Helpful and Legally Valid.

The Clean Air Act general provision at 40 C.F.R. 50.1(e) defines "ambient air" as the "portion of the atmosphere, external to buildings, to which the general-public has access." EPA borrowed the term from the Health, Education, & Welfare Department for use in carrying out the NAAQS in 1971, and the agency first used it to define how EPA "would measure air quality and implement the National Ambient Air Quality Standards (NAAQS)." 36 Fed. Reg. 22,384 (Nov. 25, 1971). 1971 was six years before the Congress added the new source review permit program in the 1977 Clean Air Act (CAA) Amendments, and many years before EPA codified the NAAQS evaluation procedures for air dispersion modeling to ensure that the public would not be endangered by emissions from new or modified sources by requiring permit applicants to evaluate whether the NAAQS or NAAQS Increments would be violated or endangered in Prevention of Significant Deterioration Areas. (Nonattainment areas are not subject to the same NAAQS or NAAQS Increment evaluations in nonattainment NSR, because of other prohibitions on growth requiring permit applicants to obtain equal or greater emission offsets before they can begin operations of a new or modified source.)

The fact that the term was a legal term that EPA borrowed from the Department of Education and Welfare's public health program to anchor the NAAQS and then, borrowed again to implement the Act's new source permit program --but only in PSD-attainment areas--suggests its limitations and future need for implementation interpretation. Consequently, EPA and the State and Local Air Pollution Control Agencies have adapted the use of "ambient air" many times, as indicated by the number of modeling and permit applicability determinations in EPA's NSR history and guidance on the term on State websites.

So first, from a legal perspective, the "revisions" to it is perfectly legitimate for EPA to "revise" its interpretation of "ambient air" to capture EPA's and other air permitting agencies' interpretations of "ambient air" on a case-by-case basis over the past decades of CAA history. The very fact that EPA has continued to re-interpret and apply the term based on case-by-case factors throughout the nearly fifty-year history of the Act makes this revised guidance well-within the agency's discretion to interpret the law that it administers. Moreover, EPA has historically recognized that some persons that have both legal and practical access to the property such as contractors or delivery persons are members of the public are within the owners or operators' control and thus they should be excluded from consideration in evaluating "public" ambient air exposures.[1] This applies particularly to environmental contractors that not

[1] Revised Guidance at page 3.

infrequently operate locations within a plant's fence- line to service the owner/operators' air pollution devices or conduct other services related to the owner/operator's principle function.[2]

From a legal and policy perspective it would be unreasonable for the agency to ignore technology innovations or natural barriers other than a fence or other physical boundaries that prevent or deter access by the public. Over the past decades, EPA has recognized on a case-by-case basis that natural barriers can be relied on to effectively bar the public from a plant site and that shoulder-high-placarded fences also can be a highly effective deterrent to members of the public who might be interested in gaining access to property or simply be unaware that it is private and surveilled property that is protected from common law trespass. The fact that a barrier, whatever its nature, informs but does not absolutely prevent the concerted effort of a member of the public from accessing private property does not insulate a member of the public from the law and other penalties, as many a hunter has learned. Now property can be furthered secured by drones, remote cameras and video surveillance, and future technologies will enable safer and effective bars to entry, making it appropriate and highly reasonable for EPA to embrace these advances when interpreting "ambient air" to which the public has access.

Second, it is practical and appropriate for EPA to "re-interpret" how a property owner, under the constructs first articulated by Administrator Costle in 1981, has the power to exclude public access from its property. Thus, providing examples of categories of electronic surveillance and other updated means for securing a plant site from access a plant for safety, business, and other reasons is perfectly reasonable, much less a departure from established EPA practice. To the extent that this policy continues to direct air permit authorities that "ambient air" is a case-by-case evaluation, as noted on pages 4 and 7 of the Revised Guidance, further cements the fact that EPA's "Draft" is not overly broad and thus, arbitrary and capricious or that it is a legislative rule, on which public notice and comment is required.

2. <u>The Draft Revised Policy Falls Well-Short of Permit Applicant's Need for EPA to Re-Examine How the Term "Ambient Air" is Utilized for Air Permitting Analyses</u>.

Notwithstanding our agreement with portions of the Draft Guidance, NEDA/CAP finds EPA's reticence to re-interpret "ambient air" or consider the adoption of a new term that functions practically within the context of PSD permitting in the 21st century unreasonable. In particular, NEDA/CAP's view is that the Draft's helpfulness is diminished by its failure to address the attenuated exposure of people who use private and/or public easements across plant property that is owned and controlled by manufacturers and other private entities.

One particularly important issue for manufacturers is that large manufacturing sites often have easements that run through the plant's property. They include roads, railroads, rivers, and related means of transport that are used by the plant *and* by the public under controlled

[2] See, e.g., J. Calgcagni, "Prevention of Significant Deterioration (PSD) Applicability Determination for Multiple Owner/Operator Point Sources Within Aa Single Facility (Aug. 11, 1090) (*an airport is a single stationary source if the pollutant emitting activities are under the control of the same person at the time construction would commence on the proposed source even if discrete portions of the airport's pollutant-emitting activities are leased to other control after construction*).

circumstances. The PSD-permitting problem for owners of plant sites that include easements is that EPA regulations, improperly, treat easements as "ambient air" because the public may have access to them even though the plants still own and control that property over which the easement is located. Consequently, under PSD, owners/operators that want to expand their manufacturing processes are required to analyze potential "ambient air" impacts on NAAQS and the NAAQS increments along the easements. However, legally, an easement is not "ambient air."

By definition an easement is "a nonpossessory right to use and/or enter onto the real property of another without possessing it." Wikipedia, Merriam Dictionary, etc. An easement is "best typified in the right of way which one landowner, A, may enjoy over the land of another, B." See Restatement (Third) of Property. Typical enforceable easements include "rights of way, easements of support (pertaining to excavations); easements of "light and air," and rights pertaining to artificial waterways. For this reason, NEDA/CAP recommends that the agency should revise its "ambient air" interpretation further to allow easements to be excluded on a case-by-case basis from the definition of "ambient air."

The notion that easements are not ambient air also is consistent with Administrator Costle's 1981 Guidance on "exclusions from ambient air" because the area is owned or controlled by the source's owner/operator. While most easements have a physical barrier—especially railroads—to bar the public from entry, other types of easements are surveilled by plant owners/operators to prevent people utilizing them on a temporary basis from entering onto land outside the immediate easement for all the same reasons that a fence or other physical barrier is erected on a plant property line. The right of way, be it a path or highway, limits access to transit across property, and it also precludes any individual from parking, picnicking, or in any way entering or spending time on a plant's property. Video surveillance, drones, and other sensor technologies, reinforce the legal control of the owner/operator over the easement. Thus, easements are designed to limit a person's ability to spend time on the property other than for the purpose for which the easement exists. In turn, an easement therefore generally limits the type and duration of exposure a member of the public using the easement has to plant emissions. Thus, NEDA/CAP recommends that EPA could and should interpret "ambient air" to exclude easements such as railroad tracks and other areas, including facilities owned or operated by tenants adjacent to or within the same fence line, to which the public has no, or very limited, access and potentially no, or at most extremely limited, annual, 24-hour, or even hourly exposure to plant emissions on a public road, river or railroad.

3. If EPA Does Not Further Revise Agency Guidance to Exclude Easements from "Ambient Air," It Should Address How Short-Term Exposures of Persons Using Easements are Characterized by Air Dispersion Models for PSD Permitting.

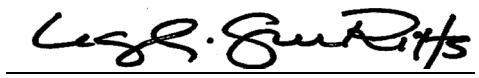
NEDA/CAP's members are concerned that EPA has not taken this opportunity to address "ambient air" in the context of limited public exposure to emissions, particularly on easements. Given that "ambient air" is the legal surrogate for determining healthful exposures of the public to air emissions for purposes of setting the NAAQS, and recognizing that the NAAQS are based on long-term emissions exposures, air dispersion modeling techniques should specifically acknowledge and discuss how permit applicants may address potential short-term exposures to

emissions on easements. The Modeling Guideline, at Part 51, Appendix W, Section 9, provides this sort of flexibility in tailoring inputs for PSD permitting. NEDA/CAP suggests that the Guideline should be amplified in supplemental EPA technical guidance to allow reasonable assumptions regarding consideration of how long a member of the general public can be exposed to air external to manufacturing buildings, but within a plant's property if it does not feel it would be appropriate to exclude these areas from the definition of "ambient air" entirely.

NEDA/CAP recommends that EPA should interpret the meaning of "ambient air" to focus on reasonably anticipated exposures (i.e., modeling "receptors" should not be located where a member of the public cannot be reasonably expected to be present for the duration of an ambient standard). This change also could be implemented by revising 40 C.F.R. Part 51, Appendix W (Section 9.2.2) to allow the use of probabilistic modeling for selecting receptor locations in air dispersion grids. and calibrating the exposure of the public in an easement through interpretation of how Appendix W air dispersion receptors are modelled in easements and also, by revising the definition of ambient air in 40 CFR §50.1(e) by recommending to permit authorities that site-specific circumstances should be taken into account and receptors may be excluded from areas where natural, man-made (including physical or remote monitoring of restricted areas), jurisdictional, or legal barriers, preclude the potential for public exposure consistent with the frequency or averaging time specified for the NAAQS or PSD increment that is being modelled.

Conclusion – NEDA/CAP appreciates this opportunity to provide comments on EPA's draft interpretation of "ambient air." We urge the agency to finalize it, while it further considers the property law regarding easements and further examines developing guidance on how easements are utilized by the public and how those potential limited exposures should be factored into dispersion modeling of ambient air impacts from new or modified facilities.

Respectfully submitted on behalf of NEDA/CAP,



Leslie Sue Ritts, Counsel

Joint Comments of Environmental Organizations on EPA's "Revised Policy on Exclusions from Ambient Air"

Date: January 11, 2019
Submitted via email and EPA.gov

The Natural Resources Defense Council, Clean Air Task Force, Environmental Law & Policy Center, and the Environmental Defense Fund (Hereinafter "Environmental Organizations[1]") appreciate the opportunity to submit these joint comments in strong opposition to EPA's "Revised Policy On Exclusions from Ambient Air" ("2018 Policy").[2] As discussed in detail below, any adoption by EPA of the interpretations reflected in this document would constitute final agency action that is arbitrary, capricious, and contrary to the plain meaning of the Clean Air Act and agency regulations relating to the definition of "ambient air." The 2018 Policy represents an unlawful departure from the governing EPA regulation and is entirely unsupported by the rationales the Agency advances. The 2018 Policy is also procedurally flawed: even if the Agency could lawfully adopt the substantive rule embodied in the 2018 Policy (it cannot), it must undergo public notice and comment rulemaking to do so.

The dictionary definition of "ambient" is "existing or present on all sides; encompassing."[3] By using this broad term, Congress did not intend to limit the air that is considered "ambient" and therefore protected under the Clean Air Act. The usage of the capacious term, "ambient air," in the statute accords with Congress's foremost goal in the Act—to protect public health and welfare. *See*, *e.g.*, 42 U.S.C. § 7401(b)(1) ("The purposes of this subchapter are to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population"); § 7408(a)(2) ("Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare that may be expected from the presence of such pollutant in the ambient air, in varying quantities."); & §

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[2] U.S. EPA, Draft Revised Policy on Exclusions from "Ambient Air" (Nov. 2018) https://www.epa.gov/sites/production/files/2018-11/documents/draft_ambient_air_guidance_110818.pdf (hereinafter "2018 Policy").

[3] Definition of "ambient," *Merriam-Webster.com*. Merriam-Webster, 2019.

7409(b) (national primary & secondary ambient air quality standards shall protect public health and welfare). There is no indication in the Act or its legislative history that Congress meant to exclude from protection against adverse public health effects workers, visitors, or delivery people at stationary sources, people who hike lands adjacent to stationary sources, or persons that may cross property boundaries with occasional signage or drones. Nor is there any indication that Congress meant to exclude from protection against adverse welfare effects private properties. Finally, as discussed at greater length in these Comments, there is no evidence that Congress intended to deny the protections of the Clean Air Act to Americans, and exempt "ambient air" from safeguards, merely because some lands employ "measures" like the ones discussed in the 2018 Policy.

The 2018 Policy makes clear that the Agency's main objective is not to protect public health and the environment, nor to implement a reasonable interpretation of "ambient air." Instead, the draft document limits the concept of "ambient air" beyond any reasonable statutory interpretation and contradicts EPA's implementing regulation—in order to ease industrial sources' permitting processes, resulting in increased "flexibility" to emit higher levels of regulated air pollution that the Agency now deems would not occur in the "ambient air." In this respect, the 2018 Policy is consistent with this Administration's relentless agenda to roll back safeguards for public health and Americans' air quality. We urge the Agency not to adopt this harmful and illegal so-called "policy," for the reasons described below.

1. Background and History

The 2018 Policy artificially constrains the definition of "ambient air" and correspondingly renders ever broader the concept of "non-ambient air" in which industrial permit applicants and emitters may disregard and violate national health-based air quality standards. The very purpose of the Policy is to make permitting and compliance with air quality standards easier for industrial sources, thereby allowing air pollution concentrations that exceed health-based standards and expose Americans to unhealthy levels of air pollution.

The overriding purpose of the Clean Air Act is to "protect and enhance" air quality, 42 U.S.C. § 7401(a), and mitigate the "mounting dangers to the public health or welfare" caused by air pollution. 42 U.S.C. § 7401(a)(2). To that end, the Clean Air Act establishes "National Ambient Air Quality Standards," or NAAQS, for so-called criteria pollutants in the "ambient air." 42 U.S.C. § 7409; *see also* 40 C.F.R. part 50. These health-based standards set nationwide limits on the level of certain types of pollution in the "ambient air." Before EPA promulgated a regulatory definition, the Supreme Court explained that "ambient air" was "the statute's term for the outdoor air used by the general public." *Train v. Nat. Res. Def. Council, Inc.,* 421 U.S. 60, 65 (1975). Consistent with this understanding, in 1971, EPA promulgated a regulatory definition of "ambient air" that defines the concept as "that portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. § 50.1(e). It is this regulatory definition that the

2018 Policy contradicts and interprets in a manner that is arbitrary, capricious and an abuse of agency discretion. The 2018 Policy is further inconsistent with any reasonable interpretation of the statutory term, "ambient air." For these reasons and others explained at greater length in these comments, EPA should not finalize the 2018 Policy; if EPA contends the Policy has been finalized already, then the Agency should withdraw the Policy immediately.

a) Prior Agency Interpretations

Agency documents from the 1970s and 1980s reveal a very narrow reading of what constitutes "non-ambient" air and outline how industry permit applicants must demonstrate that the air above parcels of land does not constitute "ambient air." For example, a 1977 EPA applicability determination notes that "the test for determining if public access is effectively precluded requires some kind of physical barrier." The 1977 applicability determination attaches a 1972 EPA Office of General Counsel Memorandum contemporaneous with the adoption of the regulatory definition of "ambient air."[4] The 1972 memo says:

> QUESTION #1 What is the meaning of the phrase "to which the general public has access" in EPA's definition of "ambient air"?
>
> ANSWER #1 We believe that the quoted phrase is most reasonably interpreted as meaning property which members of the community at large are not physically barred in some way from entering.

Id. at 2. The 1972 memo similarly points to the dictionary definition of "access" and notes that areas of private property "to which the owner or lessee has not restricted access by physical means such as a fence, wall, or other barrier can be trespassed upon by members of the community at large. Such persons, whether they are knowing or innocent trespassers, will be exposed to and breathe the air above the property."[5]

The 1972 memo finds that this focus on air quality is mandated by the statute itself, where "Section 107 of the Clean Air Act…provides: "Each State shall have the primary responsibility for assuring air quality within the *entire geographic area* compromising such State..." *Id.* at 3 (emphasis added). The memo finds authority from this section to conclude that "a definition of 'ambient air' that excepts fenced private property (or public lands) from the applicability of the Act is *probably inconsistent with the quoted statutory language; expanding the exception beyond its current limits is clearly not legally supportable*." *Id.* (emphasis added).

[4] U.S. EPA, Letter from Walter C. Barber, Director Office of Air Quality Planning and Standards, MD-10 to Gordon M. Rapier, Director Air and Hazardous Materials Division, Region II (May 23, 1977), (enclosing Memorandum from Michael A. James, Attorney, Air Quality and Radiation Division, to Jack R. Farmer, Chief Plans Management Branch (September 28, 1972)).
[5] *Id.*

In particular, both the primary and secondary national ambient air quality standards mandate a very narrow concept of "non-ambient" air since:

> it is highly unlikely that adverse effects upon weather visibility, and climate can be so restricted. In addition, it is clear that despoliation of the landscape may affect the personal well-being of many individuals in the psychic sense, even if some sort of barrier separates them from the despoliation.

Id. The Agency thus believed a constrained interpretation of what constitutes non-ambient air was mandated by the statute. The 2018 Policy does not even address, much less grapple with the contemporaneous 1972 Office of General Counsel interpretation that expanding the exemption from what is considered "ambient air" beyond fenced private property "is clearly not legally supportable," nor the view that "except[ing] fenced private property (or public lands) from the applicability of the Act is probably inconsistent with the quoted statutory language." Accordingly, the 2018 Policy arbitrarily fails to address an important part of the problem and fails to adequately explain the Agency's reversal of its position and legal interpretation of the "ambient air" regulatory definition. This gross expansion, far beyond what EPA was considering in its 1972 memo, is similarly not legally supported and is inconsistent with the plain language of section 107 of the statute. *See* 42 U.S.C. § 7407 ("Each State shall have the primary responsibility for assuring air quality within the *entire geographic area* compromising such State...") (emphasis added).

In 1980, former EPA Administrator Douglas M. Costle addressed the definition of "ambient air" in a letter to then-Senator Jennings Randolph, Chairman of the Environment and Public Works Committee, dated December 19, 1980 ("Costle letter"). The Costle letter noted that an "exemption from ambient air is available *only* for the atmosphere over land owned or controlled by the source and to which public access is precluded by a fence or other physical barriers." *Id* (emphasis added). Then-Administrator Costle noted that the "ambient air" analysis would "ensure that the public is adequately protected and that there is no attempt by sources to circumvent the requirement of Section 123 of the Clean Air Act." *Id.*

Notably, the Costle letter did not identify any basis in statutory language or the Act's legislative history for the exemption from "ambient air" outlined in the letter. Nor has EPA since then identified any statutory language or legislative history supporting the concepts introduced in the Costle letter. Moreover, the preamble to the 1971 Federal Register notice promulgating the definition of "ambient air" contained no discussion of the phrase or the concepts used to define it.

Agency documents after the 1980 Costle letter further elucidate the concept of "ambient air." A 1985 EPA Memo notes that purchasing land as a "method of attainment is not considered desirable by EPA because it does not reduce the total atmospheric burden of a pollutant and may be inconsistent with Section 123 of the Clean Air Act," similar to dispersion techniques such as

tall stack heights.[6] A subsequent 1987 agency analysis noted that "[i]f [a] physical barrier is not erected, then all land including the leased site would have to be considered as ambient air."[7]

b) 1989 GAO Report

In 1989, Congress requested that the then-General Accounting Office (GAO) review EPA's approach to the definition of "ambient air."[8] The report, which goes conspicuously unmentioned in the 2018 Ambient Air Policy, criticized deregulatory and problematic departures from the regulatory definition of "ambient air" similar to those in the 2018 Policy. The GAO report urged EPA to undertake a formal notice and comment rulemaking to resolve these problems. The GAO report title alone, "EPA's Ambient Air Policy Results in More Pollution," speaks volumes to that point. The report goes on to describe a policy that was created to "allow flexibility" for industrial emitters, but that had, over the decade looked at in the report, been "stretched," resulting in "increased pollution." GAO Report at 3, 14. The report cites two examples from the 1980s where EPA's ambient air policy had "resulted in the approval of increased source emission rates that would not have been allowed if the analyses had included land areas controlled by the company." *Id.* at 14. In both examples, sources had modeled nonattainment demonstrations, then purchased land around their facility and were granted increased permit limits. The GAO compared this approach to the use of tall stacks as a dispersion technique, since:

> both techniques increase allowable emissions by increasing the distance between the source and locations where air quality is monitored or modeled. This increased distance allows pollutant concentrations to be diluted prior to their contact with the monitored or modeled locations. As a result of this dilution, source emissions can be increased without causing violations of air quality standards.

Id. at 18. In fact, the report cites an EPA Associate General Counsel who noted in 1976 "that land acquisition as an acceptable control avoidance technique would make a 'laughingstock' out of EPA and would be a 'palpable (and incredible) affront to the Clean Air Act.'" *Id.* at 15.

In contrast, the GAO Report pointed to the example of Arizona, which at the time "defined ambient air to exclude only that area around the source required for work processes." *Id.* at 17. That state reported "little difficulty defining those work areas and ha[d] experienced no

[6] Memorandum from Darryl D. Tyler, Director, Control Programs Dev. Div. to Thomas Maslany, Chief Air Enforcement Branch, Region III, 3 (Mar. 1985).
[7] Memorandum from G.T. Helms, Chief, Control Programs Operations Branch to William S. Baker, Chief, Air Branch, Region II (July 27, 1987).
[8] U.S. Gen. Accounting Office, *GAO/RCED-89-144*, *Air Pollution: EPA's Ambient Air Policy Results in Additional Pollution*, (1989) (Hereinafter "GAO Report").

court challenges since the practice was adopted in the late 1970s." *Id.* EPA in fact considered a policy similar to Arizona's approach, and certain members of the General Counsel's Office found it to be "consistent with the 1977 Amendments' emphasis on attaining standards through continuous emission reduction rather than by dispersion dependent techniques." *Id.* at 15. In contrast, the GAO found that retention of the existing policy "provided no incentive for innovation in control or process technologies." *Id.* at 16. In pointing to the Arizona example and the internal back and forth on EPA's policy, the GAO Report strongly recommended that "EPA initiate a formal rulemaking action to redefine ambient air in a manner that is more protective of the environment." *Id.* at 21.

The GAO Report concluded its request for formal notice and comment rulemaking based on "(1) the significant environmental consequences of EPA's policy which allowed increased emissions and (2) the feasibility of an alternative interpretation of ambient air boundaries which restricts the size of nonambient air." *Id.* These concerns are even more heightened with respect to the 2018 Policy, which abandons any pretense of defining "ambient air" to include "that portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. § 50.1(e).

2. The 2018 Policy

The 2018 Policy, as noted above, is a gross expansion of EPA interpretations that themselves lack any basis in statutory or regulatory language or legislative history and, indeed, contradict the governing regulatory definition of ambient air. The plain language of the existing regulatory definition of "ambient air" does not and cannot sustain the new, different and inconsistent meanings that EPA seeks to allow (and impose) in the 2018 Policy. EPA's evident refusal to undertake a formal rulemaking further underscore the unlawfulness of adopting the 2018 Policy without notice-and-comment rulemaking.

In its 2018 Policy, EPA claims that unidentified "stakeholders" have argued that the previous ambient air policy is "overly restrictive" and that the "restrictive language from the 1980 [Costle] letter…should be updated." 2018 Policy, at 2. In proposing the 2018 deregulatory approach, the memo acknowledges that EPA's longstanding policy has been that if a source demonstrates that "(1) the area, although external to buildings, is owned or controlled by the source, and (2) access to the area by the public is precluded by means of a fence or other physical barriers," and "only if both conditions described above are met" will the area be excluded from ambient air. *Id.* The 2018 Policy revises this legal interpretation of EPA's regulation to exclude from the "ambient air" "the atmosphere over land owned or controlled by the stationary source, where the owner or operator of the source employs measures, which may include physical barriers, that are effective in deterring or precluding access to the land by the general public." 2018 Policy at 6-7. It directs air pollution control agencies to "apply a rule of reason" and directs that measures including, but not limited to, "video surveillance and monitoring, clear signage,

routine security patrols, [and] drones," may be "effective in preventing or deterring public access." *Id.* at 5-6.

a) The 2018 Policy's "Core Conceptual Elements" of "Ambient Air" are arbitrary and capricious and violate the Clean Air Act and EPA regulations.

In an effort to circumvent the restrictions and plain language of the EPA regulatory definition of "ambient air," the 2018 Policy purports to extract from that definition three "core conceptual elements"—(1) "access," (2) the "general public," and (3) "external to buildings"—in order to "assess" each of them and arrive at the 2018 Policy's deregulatory, unlawful construction of "ambient air." 2018 Policy at 5. Each portion of the Agency's "core conceptual elements" analysis reveals the 2018 Policy to be misguided, arbitrary and capricious, and a violation of the plain text of the statute and the Agency's regulation.

i) "Access"

The 2018 Policy describes the access element of the ambient air policy as "encompass[ing] two concepts: physical or practical access, and legal access." *Id.* "Physical access" meant "public access should be precluded by means of a fence or other physical barrier" under the 1980 Costle letter, but the 2018 Policy notes that it:

> replaces "a fence or other physical barriers" with "measures, which may include physical barriers, that are effective in deterring or precluding access to the land by the general public." The EPA expects that this change in its ambient air policy will provide greater flexibility in determining where to place modeling receptors for air quality analyses, while maintaining public health protection.
>
> With advances in technology and greater experience in a variety of ambient air scenarios since the 1980 letter, the EPA believes there are various measures other than fencing or other physical barriers that a facility can employ to serve as an effective deterrent to public access. These measures may include traditional fencing, but may also include video surveillance and monitoring, clear signage, routine security patrols, drones, and other potential future technologies. In many cases, such measures are already being used as effective means to deter or preclude public access to private property, even if not specifically for purposes of an ambient air exclusion.

Id. at 5. This explanation contradicts the plain language of the governing EPA regulation, which defines "ambient air" as "that portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. § 50.1(e). Under the 2018 Policy's approach, the general public still will have access to land over which the air qualifies as "ambient air" under the EPA regulatory definition, but which the 2018 Policy now defines *not* to be "ambient air."

First, the 2018 Policy invents an exemption for "measures…that are effective in deterring or precluding access to the land by the general public" that unlawfully contradicts 40 C.F.R. §

50.1(e). *Id.* 'Deterring access' to land by the general public does not mean the general public lacks access. Indeed, it means the opposite: the "general public has access," *id.*, still to property for which measures merely 'deter access' but do not block or prevent access. EPA cannot and does not argue that deterrence measures (*e.g.*, surveillance cameras, drones, or signs) would actually prevent access to land by the general public. 2018 Policy at 6. There are no factual showings in any 'docket' accompanying the 2018 Policy, or elsewhere, to our knowledge, that demonstrate any of the deterrence measures mentioned in the Policy actually prevent access to land by the general public. Instead, the Policy argues that "reasonable assurance that the general public will not have access" is sufficient. 2018 Policy at 6. This is flatly wrong, and further proof of the Policy's arbitrary and capricious nature. By defining "ambient air" as "that portion of the atmosphere, external to buildings, to which the general public has access," 40 C.F.R. § 50.1(e) is not satisfied by "reasonable assurance that the general public will not have access" when the general public continues to have actual access, for example in all the ways discussed in these comments, and more. The Policy's contrary assertion violates 40 C.F.R. § 50.1(e). The regulation does not say or suggest that 'ambient air' is 'that portion of the atmosphere, external to buildings, over land for which the owner has taken measures that offer reasonable assurance that the general public will not have access.' That different and additional consideration is entirely an EPA invention in the 2018 Policy, one that rewrites and contradicts the regulatory definition of "ambient air."

The 2018 Policy does not and cannot identify any basis in statutory or regulatory language or legislative history for this deregulatory exemption. The effect of the policy is to shrink the portions of the atmosphere considered legally protected "ambient air" under the Clean Air Act, thereby exposing Americans to unsafe levels of air pollution that may violate national ambient air quality standards. This deregulatory invention in the Policy is contrary to the plain meaning of the regulatory definition of ambient air. It is additionally arbitrary, capricious and an abuse of agency discretion.

Second, the Policy creates unidentified and unlimited 'measures' that purport to 'preclude access' to land by the general public, but in reality do not mean that the general public lacks access. *See, e.g.,* infra 16. The 2018 Policy does not and cannot identify any basis in statutory or regulatory language or legislative history for these expanded measures, including the new allowance for measures that are not 'physical barriers.'

Similarly, the 2018 Policy does not explain how reliance on even 'physical barriers' is consistent with the regulatory definition at 40 C.F.R. § 50.1(e): neither the statute, EPA regulations nor the 2018 Policy define, limit or condition the elements of 'physical barriers' that *actually prevent* the general public from having access to a parcel of land. In the real world, so-called 'physical barriers' may be short walls, three-rail fences, easily scaled walls or fences, or any number or variety of 'physical barriers' that even children could surmount. As noted in the 1972 EPA Memo, "a definition of 'ambient air' that excepts fenced private property (or public

lands) from the applicability of the Act is *probably inconsistent with the quoted statutory language; expanding the exception beyond its current limits is clearly not legally supportable*."[9] The 2018 Policy does not address its plain inconsistency with this understanding of the statute and EPA's own regulations. Again, the effect of the Policy is to shrink the portions of the atmosphere considered legally protected "ambient air" under the Clean Air Act, thereby easing permitting for industry sources and exposing Americans to unsafe levels of air pollution that may violate national ambient air quality standards. This deregulatory invention in the 2018 Policy is contrary to the plain meaning of the statute and the regulatory definition of ambient air. It is additionally arbitrary, capricious and an abuse of agency discretion.

The Agency then suggests that "relevant factors" to the access inquiry may include the "nature of the measure used (*e.g.*, physical or non-physical), facility location (*e.g.*, rural or urban), type and size of the facility, surrounding area (including the size of the population in the area, and the likelihood that people may trespass on the property), and other factors." 2018 Policy, at 5. The 2018 Policy does not and cannot identify any basis in statutory or regulatory language or legislative history for these considerations; they are arbitrary and capricious inventions by EPA, without having been subject to notice-and-comment rulemaking. The effect of these considerations in the 2018 Policy, again, is to shrink the portions of the atmosphere considered legally protected "ambient air" under the Clean Air Act, thereby exposing Americans to unsafe levels of air pollution that may violate national ambient air quality standards. This deregulatory invention in the 2018 Policy is contrary to the plain meaning of the regulatory definition of ambient air. It is additionally arbitrary, capricious and an abuse of agency discretion.

Equally unlawful, the invented considerations are not just irrelevant to the regulatory definition; they purport to allow EPA, regulated entities and state and local permitting authorities to consider nonregulatory "relevant factors" and thereby contradict the regulatory definition of "ambient air." None of the "relevant factors" listed by EPA is legally or factually relevant to whether 'the general public has access to that portion of the atmosphere, external to buildings.' 40 C.F.R. § 50.1(e). Indeed, considering these to be "relevant factors" directly contradicts the regulatory definition and statute.

Rather than attempting to reconcile these concepts or grapple with the regulatory and statutory language, EPA instead focuses on trespassing and the nature of access. The 2018 Policy states that "it was always possible for some fences to be scaled and other types of barriers to be breached" and, as such, "under this revised policy, measures may be considered to be acceptable even if they are not 100 percent effective in preventing public access." 2018 Policy, at 6. It is unlawful, arbitrary and capricious, and an abuse of discretion for EPA to rely upon a consideration that lacks any statutory basis (areas "to which the general public has access") as

[9] Supra, n.4, citing to section 107 of the Clean Air Act (emphases added).

the means to argue that *deviating from and ignoring that consideration* justifies even greater shrinking of the statutory and regulatory understanding of "ambient air." It is arbitrary and capricious to bootstrap deviations from the regulatory definition of "ambient air"—invoking examples where it is plain the general public *does* have access to property—in service of an effort to *broaden* permissible deviations from that definition. This is the essence of arbitrary and capricious agency action. Two wrongs do not make EPA's interpretation in the 2018 Policy right or consistent with the statutory or regulatory concept of 'ambient air.'

The Agency further attempts to justify its proposed deviation from the regulatory definition with its citation to the *REDOIL* case, in which a court concluded that an overwater source did not have to install a fence or other physical barrier where the court found it to be impossible due to the source's location at sea. *REDOIL v. EPA,* 716 F. 3d. 1155 (9th Cir. 2012). In contrast to examples of the agency's fidelity to the regulation's strict requirement to prevent access by the general public, the 2018 Policy points to this single unusual example of the grant of a "safety zone" over water due to the physical impossibility of constructing a fence. 2018 Policy, at 4. Again, the 2018 Policy uses this arcane example to bootstrap and attempt to justify other deviations from the regulatory language. The 2018 Policy cites REDOIL's "safety zone" to conclude that there are also "situations over land where it may also be impractical or unduly burdensome to require a source to install a fence." *Id.* Again, relaxing statutory and regulatory requirements because they may be challenging to meet (especially concerning elements that appear in neither the statute or the regulation) does not justify failing to apply the law in a way that protects the public.

EPA's own explanations and allowance for measures that merely 'deter' public access turn on its head the regulatory definition of ambient air. The 2018 Policy's invention and acceptance of 'deterrence' measures mean the general public has full access, but EPA or regulated entities or state or local agencies somehow *hope* the public will be deterred. Moreover, the fact that even 'physical barriers' could be scaled or breached means that "the general public has access" within the plain meaning of 40 C.F.R. § 50.1(e). This regulatory definition does not mention 'trespass.' It certainly does not say that if a member of the general public is trespassing on property—whether knowingly or inadvertently— that the person 'lacks access' to the property. Indeed, that reading and conclusion contradict the plain meaning of 40 C.F.R. § 50.1(e), and rely upon a factor (trespass) that lacks any basis in statutory or regulatory language. This EPA may not do. And EPA certainly may not rely upon such a nonregulatory, nonstatutory consideration to *expand* the breadth of unlawful, arbitrary and capricious exemptions from the concept of ambient air. By allowing nonregulatory, invented measures to expand any exemption from what is considered ambient air and relying upon previous inadequate barriers to access as the rationale for doing so, the 2018 Policy is unlawful, arbitrary and capricious, and an abuse of agency discretion.

ii) "general public" and "external to buildings"

As an initial matter, it is unjustified and arbitrary to contend that Congress did not intend to protect *all* Americans, including workers at stationary sources, for example, under the Clean Air Act. In fact, numerous provisions in the Act specifically provide for worker protections. *See, e.g.,* 42 U.S. C. § 7412(r) (Risk Management Plans mandating provisions for safety at facilities). Further, nowhere in the 2018 Policy (or elsewhere) does the Agency identify any support in statutory language or legislative history for the notion that groups of people can be denied safe air quality in defining what is considered "ambient air." EPA has invented an arbitrary and capricious exclusion for individuals not considered members of the "general public." Now, the 2018 Policy seeks to expand that exclusion and fail to protect individuals that are an unquestionable part of the general public.

Again, the Agency's own examples underscore the absurdity of their new policy formulation. The agency notes that "atypical public access such as swamps and large tracts of undeveloped private land" or rugged terrain would constitute an effective measure for excluding public access, simply because the "general public" may be less likely to find themselves there. 2018 Policy, at 6. Of course, many people hike across rugged terrain, or take airboats across swamps, or walk across large tracts of undeveloped land. These everyday actions should not and may not exclude them from the protections accorded to the "general public." In fact, previous Agency analyses have noted just this,[10] and EPA arbitrarily fails to explain or justify its departure from prior agency interpretations at odds with new exclusions created in the 2018 Policy.

This represents an unlawful narrowing of the "general public" in the regulatory definition for "ambient air." It is an arbitrary and capricious construction of this definition, as well as the statutory concept of "ambient air," to deny Clean Air Act protections to *any* persons that are members of the general public on the absurd grounds that not *all* members of the general public will or may have access to a given parcel of land. It is unlawful to redefine and narrow what is considered "ambient air," contrary to the regulatory definition and any reasonable construction of the statute, when the general public that has access to land is the "atypical public," capable of accessing land across 'swamps, large tracts of undeveloped private land, rugged terrain, land bounded by waterbodies or the like.' The 2007 memo that the Agency cites in its 2018 Policy itself acknowledges that the "general public" at times depends on who owns or is renting the property, as in the case of lessors/lessees, and also may "include persons who are frequently

[10] U.S. EPA, Letter from R. Douglas Neeley, Chief, to Ronald Methier, Chief, Air Protection Branch, Georgia Environmental Protection Division (Dec. 13, 2000) ("a shoreline by itself is not a sufficient barrier to public access to qualify the land area as non-ambient air for impact modeling"); U.S. EPA, Letter from Darryl D. Tyler, Director Control Programs Development Division to Thomas Maslany, Chief Air Enforcement Branch, Region III (Mar. 1985) ("publicly accessible areas such as highways and rivers may show violations of NAAQS")

permitted to enter restricted access land for a purpose that does not ordinarily benefit the business."[11]

The 2018 Policy does not and cannot identify any basis in statutory or regulatory language or legislative history for this feature of its deregulatory exemption. The effect of the policy is to shrink the portions of the atmosphere considered legally protected "ambient air" under the Clean Air Act, thereby exposing Americans to unsafe levels of air pollution that may violate national ambient air quality standards. This deregulatory invention in the 2018 Policy is contrary to the plain meaning of the regulatory definition of ambient air. It is additionally arbitrary, capricious and an abuse of agency discretion.

Moreover, EPA itself has previously and specifically rejected the suggestion that the general public does not deserve the statutory protections afforded ambient air simply because they are not always present in a particular location. In response to an industry group's assertion that near-road monitoring was not necessary for $PM_{2.5}$ standards since "people are not at NO_2 near-road monitoring sites [] for 24-hours at a time, let alone for a full year," Nat'l Ass'n of Mfrs. v. E.P.A, 750 F.3d 921 (D.C. Cir. 2014), Pet. Br. at 36. EPA specifically noted that:

> near-road $PM_{2.5}$ monitoring represents PM2.5 concentrations in the "ambient air." "Ambient air" is defined by EPA to include that "portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. § 50.1(e). The general public has access to ambient air near major roads.

Id., EPA R. Br., p 48 n 20. The court agreed. Nat'l Ass'n of Mfrs., 750 F.3d at 926. Air pollution, much like the trespasser that ignores no trespassing signs, does not respect property lines. Pollution concentrations on one side of a source's property line will represent the same concentrations on the other side of the property line, and the general public is no less deserving of protection on either side.

The 2018 Policy does not and cannot contend that unsafe air quality above property accessible to individuals via rough terrain or swamps or the like is any safer than air quality over adjacent areas that also violates national ambient air quality standards. Rather, the agenda in the 2018 Policy is simply to make it easier for businesses to build and expand, regardless of the pollution impacts, thereby allowing unsafe ambient air where Americans are exposed to it or may be exposed to it. This is done contrary to EPA regulations and the statute, in order to grant polluters more flexibility to violate national ambient air quality standards. 2018 Policy, at 2, 4. Indeed, the 2018 Policy admits that unidentified stakeholders (plainly, industry stakeholders) have specifically taken issue with just this fact—that the "need to demonstrate NAAQS attainment just beyond the property boundary" even if "no members of the public are expected to be present," *id.* at 4, is too onerous.

[11] U.S. EPA, Memorandum from Stephen D. Page, Director, Office of Air Quality Planning and Standards, to Regional Division Directors (Jun. 22, 2007).

Claims of burden are irrelevant to the health-based NAAQS. Speculation and expectations about public presence provide no justification for violating the plain language of the Act and 40 C.F.R. § 50.1(e). Neither mentions 'expectations' about the presence of the general public. Indeed, 40 C.F.R. § 50.1(e) contradicts the relevance and permissiveness considering such expectations, since the regulatory test is instead whether "the general public has access." This is a criterion that will be met (or not) *independent of* whether the general public is presented or is expected to be presented. Any crediting of these arguments by EPA in interpreting the statute or 40 C.F.R. § 50.1(e) would be arbitrary and capricious, and an abuse of agency discretion.

b) <u>The 2018 Policy lacks a basis in the statute and EPA regulations.</u>

As noted above, nowhere in the 2018 Policy does EPA identify any statutory or regulatory authority, or legislative history, to support revising the definition of "ambient air" in the manner done in the policy. The plain language of the statutory term, "ambient air," and the regulatory definition, do not contemplate the expansively deregulatory policy EPA announces in its 2018 Policy. The policy reads an exclusion into the regulatory definition of "ambient air" that excludes "the atmosphere over land owned or controlled by the stationary source, where the owner or operator of the source employs measures, which may include physical barriers, that are effective in deterring or precluding access to the land by the general public." 2018 Policy at 6-7. The Agency does not attempt to tie this language back to the statute, and the Act does not provide the agency with unbounded discretion to define statutory terms. Nor does the Act or administrative law provide EPA authority to do that beyond regulatory definitions, and certainly not through documents that are issued without following notice and comment requirements of the statute. 42 U.S.C. §7207.

Further, the approaches in the 2018 Policy document not only violate the regulatory definition of "ambient air" and its underlying statutory language, but they also directly contravene section 123's restriction on dispersion techniques. 42 U.S.C. §7423. This section was added to the Act in 1977 and provides that "the emission limitation of a source cannot be increased simply because the pollution is being dispersed through a tall stack or 'any other dispersion technique.'" GAO Report, at 18. The legislative history accompanying these provisions noted that "adoption of these provisions is intended to reaffirm … that atmospheric loading through dispersion technology is not an acceptable means of meeting State Implementation Plan emission limitations." *Id*. The GAO Report states that "the adverse environmental consequences of land acquisition are similar to those from the use of [dispersion techniques like tall stacks]" since "both techniques increase allowable emissions by increasing the distance between the source and locations where air quality is monitored or modeled." *Id.* Since even the 1980 policy had "adverse consequences similar to those resulting from the prohibited dispersion techniques outlined in section 123 of the [A]ct," *id.* at 21, the 2018 Policy's even more deregulatory regime violates Section 123's prohibitions to an even greater degree.

Indeed, as the GAO concluded with respect to the 1980 policy, excluding greater areas from the "ambient air" has the exact same result as building higher stacks—it enables higher levels of air pollution by placing it farther from air pollution monitors. It is irrational to contend that even while prohibiting dispersion techniques like tall stacks and "any other dispersion technique," Congress intended to enable dispersion techniques through the use of the term "ambient air." 42 U.S.C. §7423.

Compounding these problems, EPA asserts that its policy change will not impact public health. 2018 Policy, at 5. However, much like other parts of the 2018 Policy, there is no analysis or support provided for this conclusion. Further, the conclusion that this policy will not impact public health runs counter to both common sense and what past practice indicates is true of a deregulatory "ambient air" policy. *See, e.g.,* GAO Report at 19, 20 (relating permitting experiences where industrial sources emitted more pollution as a result of land acquisition). The Agency has further abdicated its responsibilities in entirely failing to analyze or disclose to Americans the 2018 Policy's potential adverse impacts on air quality and public health that would result from increased air pollution levels, and increased areas where pollution may grow. This is yet another reason why the Policy is arbitrary and capricious, and an abuse of agency discretion.

3. The 2018 Policy is a Procedurally Deficient Rule Disguised as Agency Guidance.

EPA's 2018 Policy is an unlawful attempt by the Agency to portray a legislative rule with significant legal, environmental, and public health implications as harmless agency guidance, in circumvention of the rulemaking process. This kind of subterfuge has been repeatedly invalidated by the federal courts as a violation of the Act and its administrative law requirements.

The D.C. Circuit has described an interpretive rule as "agency action that merely interprets a prior statute or regulation, and does not itself purport to impose new obligations or prohibitions on regulated parties," and a legislative rule as "[a]n agency action that purports to impose legally binding obligations or prohibitions on regulated parties—and that would be the basis for an enforcement action for violations of those obligations or requirements." *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251-52 (D.C. Cir. 2014). When deciding whether a rule is legislative or interpretive, the D.C. Circuit has looked at the following factors: "(1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule." *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). Based on this test, adoption of the 2018 Policy without notice and comment rulemaking would represent an unlawfully issued legislative rule.

Similarly, agency guidance may be deemed an unlawfully adopted legislative rule if the agency is giving permitting agencies their "marching orders." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000). The D.C. Circuit determined this to be the case in *Appalachian Power*, where legal consequences flowed from an EPA guidance document because it created obligations on the part of state regulators. *Id.* The 2018 Policy is similar to the guidance document in *Appalachian Power* because it contains instructions from EPA regarding how air agencies are expected to act in response to a change in policy. Therefore, this change creates legal consequences and obligations for air agencies and should be treated as a legislative rule that cannot be lawfully promulgated without following the Act's rulemaking procedures in section 307 for public notice and opportunity for comment. 42 U.S.C. §7207.

a) <u>The 2018 Policy effectively amends the regulatory definition of "ambient air"</u>

The 2018 Policy is a legislative rule and final agency action because it effectively amends the regulatory definition of "ambient air." 40 CFR § 50.1(e) defines ambient air as "that portion of the atmosphere, external to buildings, to which the general public has access." The 2018 Policy would unlawfully amend the definition of ambient air so that it may no longer include the atmosphere over land that is "*owned or controlled by the stationary source, where the owner or operator of the source employs measures, which may include physical barriers, that are effective in deterring or precluding access to the land by the general public.*" 2018 Policy at 6-7 (emphasis added).

This change represents a significant departure from, and contradiction of, both the regulatory definition of "ambient air" and the 1980 Costle Letter. The 2018 Policy misconstrues the statute and regulatory definition to grant legal permission, for the first time, to regulated entities, state, local and tribal permitting authorities and EPA, to exempt from the Act's understanding and treatment of "ambient air" that air over land where an owner or operator employs measures to deter access, or prevent access, even if those measures do not *actually prevent* access by the general public. That is, the Policy treats parts of "that portion of the atmosphere, external to buildings, to which the general public has access" as no longer being "ambient air," contrary to the Act and 40 CFR § 50.1(e).

The 1980 Costle Letter, which itself is more permissive than the regulatory definition, at a minimum required that access to the land be precluded by a physical barrier to qualify for exemption, not merely deterred by unspecified measures, or purportedly precluded by non-physical barriers. The 2018 Policy would effectively amend the regulatory definition by shrinking the scope of ambient air (and the public health and environmental benefits provided to that ambient air) to a significantly smaller portion of the atmosphere than the regulatory definition contemplates.

The 2018 Policy also shifts the focus of the ambient air application analysis from the accessibility of the land and air to "the extent to which persons *would be likely* or able to trespass

upon or otherwise have access to the facility's land." 2018 Policy at 5-6 (emphasis added). This unlawfully introduces a factor that finds no basis in the statute or regulatory language, and arbitrarily and capriciously changes the regulatory legal test from whether "the general public has access" to whether "persons *would be likely* or able to trespass upon or otherwise have access to the facility's land." That new test contradicts the plain language of the regulation and would permit ambient air over land to which the general public has access to be considered non-ambient air, based on the subjective, arbitrary and capricious factors of 'likelihood or ability to trespass upon or otherwise have access to a facility's land.' This marks a dramatic departure from the regulatory definition, which focuses exclusively on whether the public has access regardless of the likelihood or ability to trespass or access land. Under the 2018 Policy, air agencies could exempt a significantly larger portion of the atmosphere from ambient air quality standards, allowing proportionally more air pollution and resulting health impacts. This change is not merely an interpretation, but a significant revision to the scope of the existing exemption and regulatory definition of ambient air. Thus, the 2018 Policy effectively amends an existing legislative rule and is itself a legislative rule.

The 2018 Policy provides a windfall to stationary source owners by excluding from the definition of "ambient air" ever larger tracts of land and thereby excluding them from compliance with ambient air quality standards. This provides a definitive benefit to stationary source owners that did not exist under the regulatory definition of "ambient air" or the 1980 Costle Letter. Without the 2018 Policy, there would be no basis for granting stationary source owners the benefit of an exclusion for air over land they own or control where they merely deter access without a physical barrier. By effectively increasing the scope of the areas that can be exempted from complying with ambient air quality standards, the 2018 Policy unlawfully authorizes stationary sources to emit higher levels of pollution and violate national ambient air quality standards.

b) <u>The 2018 Policy constitutes both a legislative rule and final agency action because its language is binding and gives marching orders to air agencies</u>

Contrary to boilerplate language in the 2018 Policy claiming it "does not create or change any legal requirements on the EPA, on state, local, and tribal agencies, or on the public," the 2018 Policy in fact does just that. Indeed, it gives marching orders to agencies instructing them to implement this change. The 2018 Policy states that this change "should be implemented by EPA Regional offices and delegated state and local air agencies." 2018 Policy at 7. The 2018 Policy also states that "[a]ir agencies are expected to apply a rule of reason in assessing the effectiveness of proposed measures" and that "[a]ir agencies should evaluate the effectiveness of a 'measure' in precluding public access based on the relevant, specific circumstances." 2018 Policy at 5-6. The 2018 Policy communicates EPA's expectation and instructions regarding implementation of this change to EPA regional offices and state and local air agencies: "EPA has given the [agencies] their 'marching orders' and EPA expects the [agencies] to fall in line."

Appalachian Power Co. v. EPA, 208 F.3d 1015, 1023 (D.C. Cir. 2000). The specific instructions directed to various air agencies combined with the fact that the 2018 Policy dictates how regulated parties will be required to comply with the Act underscores that the 2018 Policy is an illegal legislative rule that the Agency must not finalize without formal notice and comment rulemaking procedures.

4. The 2018 Policy Lacks Reasoned Explanations and Violates the Clean Air Act.

Even if the 2018 Policy were determined to be an interpretive rule, a federal court still should vacate the policy because the substance of the policy and the departure from existing exemption requirements are unjustified, arbitrary and capricious, and violate the Clean Air Act.

a) The 2018 Policy is an unlawfully expansive and vague exclusion from the definition of "ambient air" that would allow more pollution and violate the Clean Air Act

The 2018 Policy fails to provide adequate justification for the creation of new, expansive and vague exclusions from the definition of "ambient air." The practical effect of the 2018 Policy is to expand the ability of stationary sources to utilize land acquisition, weak property monitoring tools, and exemptions to claim compliance with ambient air quality standards. Under the 2018 Policy, stationary source owners could potentially represent "compliance" with ambient air quality standards by acquiring land with air quality that violates national standards, placing "No Trespassing" signs occasionally on the perimeter, and satisfying the cursory, non-regulatory criteria invented by EPA in the 2018 Policy. None of these measures would actually prevent access to the property by the general public, yet the 2018 Policy would deem this to be the case, contrary to the regulatory definition and statute. Such an approach prioritizes industry convenience and EPA deregulatory preferences over public health and air quality, with harmful consequences for human health and the environment.

In drafting its deregulatory 2018 Policy, EPA entirely fails to explain how expanding portions of the atmosphere not considered to be ambient air, thereby allowing more pollution from stationary sources, is at all in the interest of public health or environmental protection. EPA claims that the change "will provide greater flexibility in determining where to place modeling receptors for air quality analyses, while maintaining public health protection." 2018 Policy at 5. However, just such so-called "flexibility" in placing receptors allows sources to obscure the true air quality impact of their emissions, with adverse results for public health. The throwaway phrase at the end of this sentence ("while maintaining public health protections") is contradicted by the consequence of the Policy: air quality now would be allowed to violate national ambient air quality standards, where before it would not. It is irrational for EPA to claim that 'public health protections are being maintained,' when the Act's core public health protection mechanism, the NAAQS, now may be contravened. The 1989 GAO Report provides two

historical examples where emissions in nonattainment areas were allowed to increase precisely because of this so-called placement 'flexibility,' *see supra,* pgs. 6, 13.

Furthermore, while EPA argues that the public always was able to scale or breach physical barriers, the agency utterly fails to address the potentially significant increase in actual or inadvertent trespass and access by the public and the resulting exposure to unsafe levels of air pollution. For example, particularly vulnerable members of the public, including young children, who would have been precluded from accessing the property by a physical barrier, may not be deterred by surveillance cameras, drones, security patrols, or signs, and may inadvertently wander on to the property and be exposed to dangerous levels of pollution in the ambient air. None of the potential measures mentioned by EPA is as effective at preventing access as a physical barrier, and each has vulnerabilities that a physical barrier does not have which can render them ineffective as deterrents. For example, surveillance cameras and drones may have blind spots; security patrols cannot be everywhere; and signs can be ignored, may be written in different languages than ones understood by all members of the general public, or simply may not be effective in blocking actual access. What is any reasonable person who sees a drone in the sky supposed to think, other than, 'Look. There's a drone in the sky."

It is also worth noting that the 2018 Policy's requirements for the ambient air exclusion are far less clear than those in the Costle Letter. Despite "numerous stakeholder requests to clarify what areas may be excluded from ambient air," the 2018 Policy would make ambient air exclusion exercises even less clear, as state agencies and EPA would have even more discretion to approve or deny exclusions. 2018 Policy, at 3. Replacing the "fence or other physical barriers" requirement with "measures, which may include physical barriers, that are effective in deterring or precluding access to the land by the general public" introduces significantly greater ambiguity to the ambient air exclusion requirements, and would only deepen the regional inconsistencies that the 1989 GAO report noted was occurring as a result of the Costle letter. 2018 Policy at 5; GAO Report at 17. EPA's suggestion that measures could include "other potential future technologies" highlights this ambiguity. 2018 Policy at 5. This suggestion also highlights the degree to which the Policy is a rulemaking-in-disguise, attempting to create permissive categorial exemptions from ambient air through descriptions that anticipate even more 'measures' qualifying for EPA's grant of permission. Greater subjectivity and ambiguity in the 2018 Policy in fact underscore the entirely arbitrary and capricious approach inherent in the policy.

The complete absence of persuasive arguments and legal justification in the 2018 Policy means that a reviewing court would not be convinced by EPA's reasoning under the *Skidmore* doctrine and the policy would be struck down. The 2018 Policy would expand exclusions from what is considered "ambient air" to the point that the exception would nearly swallow the rule and allow significantly higher levels of air pollution that threaten public health. EPA has failed to provide persuasive justification for making the changes described in the 2018 Policy, while also failing to explain how the changes protect public health.

b) EPA has failed to provide a reasoned explanation for the 2018 Policy

EPA has failed to provide a reasoned explanation for effectively changing the definition of "ambient air" at 40 CFR § 50.1(e). This change would create a weak artificial boundary that would exempt significantly more air from complying with CAA requirements, and thereby allow significantly more pollution to be emitted from stationary sources. EPA lauds the "greater flexibility" created by this change but fails to address the air pollution increases that the Policy allows, and which previous Agency analyses have noted is inherent by expanding what is considered non-ambient air. 2018 Policy at 5. EPA's expectation and declaration—without factual backup or analysis—that this change can be made "while maintaining public health protection" constitutes wishful thinking, not reasoned explanation.

EPA also fails to provide sufficient explanation for why a change to the prior policy was warranted. In the 2018 Policy, EPA mentions that some 'stakeholders' consider aspects of the ambient air policy to be "inflexible or outdated." 2018 Policy at 4. However, EPA's own examples of "measures" that would be "up to date" underscores the policy's lack of explanation, as security patrols and surveillance cameras (not to mention "no trespassing signs") certainly existed prior to 1980 and are not new technology. EPA fails to provide an adequate explanation for why stakeholders' concerns about lack of flexibility or outdated policy warrant undermining the public health and environmental protections required by the Clean Air Act.

5. EPA's Proposed Changes Directly Succumb to Industry Requests

EPA's Policy comes entirely at the behest of industry groups and is aimed at satisfying industry interests, rather than furthering the Agency's mission to protect public health and the environment.

Over the last two years, numerous industry groups and associations have sought the same specific changes to the definition of "ambient air" that EPA now proposes to adopt. The National Environmental Development Association's Clean Air Project requested changes to the definition of ambient air, specifically suggesting that EPA redefine "public access" for purposes of the definition.[12] Many other groups across industrial sectors such as the Industrial Energy Consumers of America, the American Fuel & Petrochemical Manufacturers, American Wood Council, the Council of Industrial Boiler Owners, and the Fertilizer Institute echoed these same suggestions in a Department of Commerce docket looking at the *Impact of Federal Regulations*

[12] *See* National Environmental Development Association – Clean Air Project, Comments on EPA's *Evaluation of Existing Regulations*, 11, *available at* https://www.regulations.gov/document?D=EPA-HQ-OA-2017-0190-38725.

on Domestic Manufacturing.[13] In fact, the American Forest & Paper Association submitted comments to the Commerce Department docket asking EPA to make changes to the definition of "ambient air" using almost identical wording to EPA's current proposal.[14] They repeated this request in congressional testimony on NSR permitting.[15]

The Agency's eagerness to revisit this regulatory definition now, at industry's request, stands in stark contrast with its failure to take up formal rulemaking in order to ensure that the policy is in line with EPA's core duties to protect public health and the environment. As discussed in detail above, almost two decades ago, a GAO report recommended "that the EPA Administrator initiate a formal rulemaking process to redefine ambient air in a manner that is more protective of the environment." GAO, *EPA's Ambient Air Policy Results in Additional Pollution* (July 1989). EPA has undertaken no such effort, yet has been quick to take industry groups up on their request for the Agency to further relax this vital policy.

6. Conclusion

EPA's 2018 Policy is an illegal expansion of prior agency interpretations in violation of the Clean Air Act and its regulations. Further, the Agency attempts to change its regulations within a so-called "policy document," without undergoing legally required notice-and-comment rulemaking procedures. This change is being attempted in order to satisfy industry demands to weaken Clean Air Act safeguards for ambient air across the United States and make it easier for

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[13]Industrial Energy Consumers of America, *Comments Re: Impact of Federal Regulations on Domestic Manufacturing,* Department of Commerce Docket ID: DOC-2017-0001 (March 31, 2017) *available at* https://www.regulations.gov/docket?D=DOC-2017-0001; American

Fuel & Petrochemical Manufacturers; Comments Re: Impact of Federal Regulations on Domestic Manufacturing, Department of Commerce Docket ID: DOC-2017-0001 (March 31, 2017). American Wood Council, Comments Regarding Impact of Federal Regulations on Domestic Manufacturing (82 Fed. Reg. 12,786 (March 7, 2017)) *available at* https://www.regulations.gov/document?D=DOC-2017-0001-0152. Council of Industrial Boiler Owners, Comments Regarding Impact of Federal Regulations on Domestic Manufacturing, *available at* https://www.regulations.gov/document?D=DOC-2017-0001-0143

[14] *See American Forest & Paper Association, Comments Re: Impact of Federal Regulations on Domestic Manufacturing,* Department of Commerce Docket ID: DOC-2017-0001, Air Attachment, available at https://www.regulations.gov/document?D=DOC-2017-0001-0144; *American Forest & Paper Association;*

[15] Testimony of Paul Noe for American Forest & Paper Association and American Wood Council before House Committee on Energy and Commerce Subcommittee on Environment Oversight Hearing on "New Source Review Permitting Challenges for Manufacturing and Infrastructure" (Feb.14, 2018) 12-14 *available at* https://docs.house.gov/meetings/IF/IF18/20180214/106852/HHRG-115-IF18-Wstate-NoeP-20180214.pdf.

industrial sources to emit more pollution, unconstrained by the health-protective mandates of the Act. The Agency should immediately withdraw this policy and, to the extent it believes the definition of "ambient air" needs revision, undertake a more health-protective and broad conception of "ambient air," through notice-and-comment rulemaking addressing 40 C.F.R. § 50.1(e). We urge the Agency to withdraw the 2018 Policy or, alternatively, urge the Agency not to adopt the Policy, following this comment period.

Signed,

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TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.
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December 21, 2018

Comments submitted via: Ambient_Air_Guidance@epa.gov

Re: Draft Guidance: Revised Policy on Exclusions from "Ambient Air"

Dear Sir or Madam:

Tri-State Generation and Transmission Association, Inc. (Tri-State) provides the enclosed comments relating to Draft Guidance: Revised Policy on Exclusions from "Ambient Air". Tri-State is a not-for-profit wholesale electric power generation and transmission cooperative serving 43 member distribution systems across 200,000 square miles of rural Colorado, Nebraska, New Mexico and Wyoming. Tri-State believes affordable and reliable power, responsibly generated and delivered, is the lifeblood of the rural West. The farms, ranches, small towns and resorts that Tri-State's member systems serve are close to the landscape and their power supply.

Tri-State derives electric energy from an owned and contracted portfolio of resources including coal, natural gas, oil, hydroelectric, wind, and solar facilities located throughout our service territory. Renewable generation resources secured under long-term contracts in Colorado, New Mexico and Wyoming provided over 30% of the electricity consumed by Tri-State's member distribution systems. Tri-State owns and operates or holds a financial interest in power plants in Arizona, Colorado, New Mexico, and Wyoming, and owns and operates or holds a financial interest in coal mines in Colorado and Wyoming that produce fuel for various coal-fired power plants that help provide power to our member distribution systems. Tri-State's transmission system includes over 5,600 miles of high-voltage transmission lines and an extensive network of substations, telecommunications facilities, maintenance centers and field offices that maintain a safe, reliable, affordable and secure electric power delivery system.

Tri-State appreciates EPA effort to revise and clarify the exclusions of how the definition of "Ambient Air" is applied in the regulatory context. Tri-State is grateful that EPA can recognize there can be more than fencing and physical barriers to limit public access to a given area and that the proposed additional deterrents can be significantly more cost effective in doing so while providing an adequate margin of safety. The proposed revisions will facilitate added flexibility while at the same time continuing to protect public health and the environment. Tri-State supports the approach that EPA is taking to provide the additional clarity on how the definition of ambient air is applied.

While we fully support the proposed revisions, Tri-State recommends that EPA implement the proposed revisions to the guidance, not as guidance, but as a revision to the regulatory definition of Ambient Air itself at 40 CFR 50.1(e). EPA reliance on the use of guidance for determining the best application of the term "ambient air" has been difficult in many circumstances due to the breadth and general nature of its guidance. The added definition and clarity of how and when to apply the term ambient air now lends itself to regulatory definition. The additional detail and direction that EPA is providing is flexible in how it may be applied, yet is clear to the point that little additional detail could be included. Also, adopting the proposed revision in the regulatory definition would make the revision more durable and less susceptible to future changes as guidance.

Tri-State supports and appreciates EPA's efforts to provide clarity to the implementation of the New Source Review program by making changes such as the proposed revision to the exclusions to the application of the definition of "Ambient Air". Should you have any questions or want to further discuss the above comments please contact Doug Lempke of our staff at 303-254-3590.

Sincerely,

Barbara A. Walz
Senior Vice President
Policy and Compliance
Chief Compliance Officer

BAW:dal:der

Cargill

January 11, 2019

Via electronic submission: Ambient_Air_Guidance@epa.gov

William L. Wehrum, Assistant Administrator Air and Radiation
Office of Air and Radiation
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Re: Comments on EPA's Revised Policy on Exclusions from 'Ambient Air'

Dear Assistant Administrator Wehrum,

The purpose of this letter is to provide Cargill, Incorporated's ("Cargill's") comments on the draft "Revised Policy on Exclusions from 'Ambient Air'", issued November 2018. Cargill appreciates both US EPA's efforts to clarify this policy and to engage the public by soliciting comment. Cargill generally agrees with the policy articulated by EPA in the draft revised policy, but like other commentators[1] requests that EPA not only address the physical or practical access aspect of the ambient air policy, but also the legal access aspect.

More specifically, Cargill requests that EPA address whether the air within a secured perimeter of an industrial complex (which excludes the general public) is considered "ambient air" for purposes of modeling air pollution impacts. Included in this request is the issue of whether "general public" is defined by the legal dictionary meaning (the general population of the area) or by some other definition. An unambiguous EPA determination on the interpretation of both definitions ("ambient air" and "general public") is essential in addressing uncertainties in New Source Review (NSR) permitting.

This is not a theoretical scenario: in order to illustrate the complexity and uncertainty surrounding this issue, Cargill is providing a description of its Eddyville, Iowa facility which has multiple stationary sources within a single fence line and adjacent stationary sources. We urge EPA, as part of its deliberations, to provide guidance on what constitutes ambient air at complex facilities like the Eddyville facility, and consider including an example of application of its policy in its guidance. Doing so would help illustrate by example how the proposed policy would be applied.

[1] See Letter from American Petroleum Institute et al. to Assist. Admin. William Wehrum, EPA re: Comments on Environmental Protection Agency's (EPA's) Draft Guidance on Ambient Air, January 11, 2019 ("Association Comments") .

Cargill Eddyville, Iowa campus

Cargill has several corn processing campuses where a Cargill plant serves as a host facility and customer and Cargill plants collocate on the same or adjacent properties. Like other manufacturers, Cargill is considering opportunities to create similar campuses at its other processing plants due to the commercial and environmental benefits such collocations bring. However, such campuses often result in a need to address the legal access element of the ambient air policy (e.g., the definitions of ambient air and general public) in order to allow air pollution permits to be issued for them.

At Eddyville, Iowa, for example, Cargill's Corn Mill serves as a host facility on a campus that also includes Eddyville Chlor-Alkali, LLC, (ECA), a Cargill subsidiary, and Cargill's Vitamin E plant. The three separate facilities at Eddyville(the Corn Mill, Vitamin E, and ECA) constitute two separate stationary sources under the New Source Review ("NSR") program, with the Corn Mill being one source and ECA and Vitamin E the other. ECA leases its plant site from Cargill while the Corn Mill and Vitamin E are both directly owned by Cargill and thus don't have a lease. All three facilities are within the same secured perimeter controlled by the Corn Mill host. The general public (meaning everyone except those employed by the three facilities, their contractors, and those doing business with those facilities) is excluded from the property within that secured perimeter. Immediately adjacent to the complex, three Cargill customers have built separate facilities. These facilities have been maintaining separate secured perimeters that preclude access by the general public.

In summary, our example complex consists of three facilities constituting two separate stationary sources (using the NSR definition of "stationary source"), located within the same secure perimeter and three adjacent facilities that each maintains a secure perimeter. The general public is excluded from all four secured sites.

Ambient air determinations to date

Under the legal access aspect of EPA's current ambient air policy, determinations of the ambient air boundary at the Cargill complex have become overly complex and counterintuitive. For purposes of modeling the ambient air impacts of the Cargill Corn Mill, the ECA facility has been viewed as nonambient air because it is located entirely within the Corn Mill's secured perimeter and has a lease with Cargill. This Cargill/ECA relationship is directly addressed by EPA guidance which states that when leased land is within a security perimeter controlled by the lessor, that land is considered non-ambient air for the lessor.[2]

In contrast, Iowa has determined that the Vitamin E facility is ambient air to the Cargill Corn Mill.[3] Even though Cargill owns both the Corn Mill and the Vitamin E facility, both are operated by Cargill employees and both are within the same secure perimeter, in the absence of federal guidance, Iowa interpreted the legal access aspect of EPA's ambient air policy to apply only to the property within a stationary source, not to all the property to which the public is precluded access. As to the Corn Mill and Vitamin

[2] Memorandum from Stephen D. Page, Director Office of Air Quality Planning and Standards to Regional Air Division Directors, "Interpretation of 'Ambient Air' In Situations Involving Leased Land Under the Regulations for Prevention of Significant Deterioration," June 22, 2007 ("Lease Guidance").
[3] Letter from Iowa Department of Natural Resources to Cargill, January 19, 2017.

E, IDNR wrote "[t]here are two sources in this situation, Cargill's Corn Wet Mill and Cargill's Vitamin E plant. Employees of neighboring facilities are members of the general public. As a result, employees of Cargill's Vitamin E plant are considered members of the general public as related to the Cargill Corn Wet Mill under the current situation. Therefore, the general public (as related to the Corn Wet Mill) would have access to the Vitamin E plant."[4] In short, Cargill's own property can be ambient to itself and a Cargill employee can become the "general public" simply by walking to different parts of Cargill's fenced property.

Finally, none of Cargill's adjacent customers are included within its ambient air boundary, despite the general public being excluded from all three.

The Eddyville facility illustrates how application of the legal access aspect of EPA"s ambient air policy can lead to a crazy quilt of determinations based on ownership, contractual relationship and the NSR source definition:

- A separate stationary source that has a lease with the host falls within EPA's Lease Guidance and is nonambient.
- In contrast, a separate stationary source that is directly owned and controlled by the host is ambient air to the host.
- Using the rational that the ambient air policy applies only to the stationary source, the ambient air boundaries of the collocated facilities (e.g., ECA or Vitamin E) would not include the host facility or the other collocated facility.
- Adjacent customer facilities are ambient to the host facility even when all facilities preclude access by the general public.

It also illustrates the compelling need for EPA to issue clear guidance on the legal access aspect of ambient air that addresses situations that weren't addressed in the Lease Guidance, situations where multiple stationary sources are owned by the same entity or there are adjacent manufacturing facilities.

Definitions of "ambient air" and "general public"

The EPA definition of "ambient air" is:

> "Ambient air means that portion of the atmosphere, external to buildings, to which the general public has access." 40 CFR 50.1(e) (emphasis added)

Under this definition, if the general public is excluded from an area, that area is not ambient air. The definition of the "general public", as reflected in a number of dictionaries, means the general population of the area and would not include employees of the three facilities.

These two definitions are critically important in the New Source Review (NSR) permitting world. This is because obtaining a permit for a major modification to a stationary source often requires the applicant to conduct an ambient air impact dispersion modeling analysis. The analysis must address ambient air

[4] Id. at 2.

impacts in the air within the vicinity of the source, with one exception (as provided in EPA's definition): the air over an area from which the general public is excluded.

Generally, there is only one stationary source within a secured perimeter, so the source does not have to address impacts within the perimeter (the health and safety of employees and authorized personnel within a secured perimeter is regulated separately by OSHA—there's no need to provide another layer of regulation to OSHA's, as EPA as recognized). However, as the Eddyville example illustrates, it is not unusual for more than one stationary source to be located within a secured perimeter, e.g., the owner's source (the host source) and other sources, such as leased facilities or other collocated facilities of the owner. In lessor/lessee cases, EPA has developed the Lease Guidance which states that when leased land is within a security perimeter controlled by the lessor, that land is considered non-ambient air for the lessor. However, the Lease Guidance does not address a situation where the same company co-locates another facility at the host's location and owns both (e.g., Cargill's Corn Mill and Vitamin E plant) or where there are adjacent manufacturing facilities (e.g., Cargill and its customers).

Legal access concerns the right of a person to enter a given property. In legal terms, it is uncommon for the general public to have any legal right to enter private property unless the property is burdened by a public easement. Individuals entering property without permission of the owner are trespassers and no longer members of the general public.[5] Accordingly, the plain meaning of "to which the general public has access" within the regulatory definition of "ambient air" is properly interpreted not to include any private property. A 1980 EPA letter, however, unnecessarily broadened the ambient air definition in context of the PSD program by considering only property owned or controlled by the owner or operator of the stationary source.[6] The EPA admitted that such an approach is not compelled by the regulatory language, but one born of policy preference. In 2007, EPA continued with this same paradigm when it provided additional guidance on the "ambient air" definition in context of leased land within a larger area controlled by the lessor.[7] In each case, EPA unnecessarily defined ambient air relative to each entities' sphere of control, rather than the totality of controlled land. It also defined "general public" in relation to each entity and not in a more general context of the "community at large."

Nothing in the codified definition of "ambient air" compels such an outcome, and EPA has not supported its policy preferences with substantial discussion of its legal or policy rationale. Indeed, a core element of the definition - -"external to buildings"- - points to a more limited view of ambient air. The 1970 CAA defines a "stationary source" as a "*building*, structure, facility or installation," *emphasis added.*[8] Thus, by its own regulatory construction, "ambient air" is outside the boundaries of stationary sources, not within. Accordingly, EPA is not precluded from considering the totality of controlled, contiguous and adjacent property in defining the boundaries of ambient air.

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[5] *See Black Law's Dictionary*, Eighth Edition, Thomson West (1999)(defining "trespasser" as "one who intentionally and without consent or privilege enters another's property, and "public" as "open or available for all to use, share or enjoy."

[6] Letter from Douglas Costle, Administrator U.S. Environmental Protection Agency (EPA) to Jennings Randolph, Senator, Chairman for Committee on Environmental and Public Works, (Dec. 19, 1980).

[7] *See* Lease Guidance.

[8] *See* Section 111(a)(2).

EPA has also recognized that the owner or operator of stationary source may differ from the person who controls access to land. In 2006, EPA determined that JM Products intended to serve as a land management company (the land was owned by a different third party) that would provide infrastructure support (e.g. roads, sound barriers, water), and would not own or control the portable rock crushers and hot-mix asphalt sources (the stationary sources) that would locate at the site. EPA did not address the "ambient air" in context of this decision, but the determination, nonetheless, serves as an example of a finding in which EPA found that the entity controlling land access differed from the owner or operator of the stationary source.[9] This determination supports EPA's leasing policy and is applicable to the ECA facility at Eddyville.

EPA's current policy on ambient air creates complexity by equating legal access with the owner or operator of the stationary source. Rather than perpetuating a policy which unnecessarily requires permitting authorities to develop a myriad of explanations or exceptions in numerous case by case decisions, EPA should instead focus the policy on assuring that ambient air includes areas where the general public (or the "community at large") has practical access and actual risks of exposure.

In sum, Cargill strongly supports the revision to the ambient air policy proposed by the American Petroleum Institute and others:

> Ambient air does not include the atmosphere over contiguous or adjacent property when measures or conditions, which may include physical or geographical barriers, effectively deter or preclude access to the land by the general public.[10]

Such a policy is consistent with the regulatory definition of ambient air and the ordinary usage of general public and fosters collocation of manufacturing facilities.

Alternatively, Cargill request that EPA provide specific guidance that the air within a secured perimeter, as the definition of "ambient air" clearly indicates, is not ambient air regardless of who is conducting the modeling (EPA, the State or Regional agency, the host source, or other sources) or who the owner or operator is. This could be as simple as expressly extending the guidance EPA has issued for leased facilities to collocated facilities owned by the same company. In addition, we request that EPA opine in writing that the term "general public" means the population within the area and does not include employees at a different industrial site within a secured perimeter controlled by the host source (making that site "ambient air", even if there is no "general public" access). OSHA very adequately regulates worker health at industrial sites and employees and business invitees of collocated sources do not comport with the common sense definition of the "general public".

[9] *See* letter from Pamela Blakely, Chief Air Permits Section, Region 5 *to* John Mayer, Sept. 20, 2006.
[10] Association Comments at 10.

Thank you for your consideration of these comments and your efforts to clarify this important policy area.

Sincerely yours,

Chuck Hallier
North America Environmental Manager
Cargill Starches, Sweeteners and Texturizers North America

Enclosure

cc: Thomas MacLeod, Cargill MS24
Gary McCutchen, RTP

Fields of Opportunities

STATE OF IOWA

TERRY E. BRANSTAD, GOVERNOR
KIM REYNOLDS, LT. GOVERNOR

DEPARTMENT OF NATURAL RESOURCES
CHUCK GIPP, DIRECTOR

January 19, 2017

Chuck Hallier
Cargill Eddyville
1 Cargill Dive
Eddyville IA 52553

Re: Ambient Air Boundaries for Dispersion Modeling
Project No: 16-245; Plant No: 68-09-001

Dear Mr. Hallier:

The Department has received and reviewed your letter of December 16, 2016 related to the dispersion modeling analysis that has been requested for Cargill's Eddyville Iowa corn wet mill facility. This modeling analysis was requested in support of your construction permit application to amend the particulate matter emission limit for Germ Expeller #2 which failed to demonstrate compliance with the existing emission limit.

Cargill's Eddyville Iowa Corn Wet Mill is located in an industrial complex that includes the Cargill Vitamin E plant and the Corn Wet Mill. To complete the modeling analysis one of the initial steps that must be completed is to define the boundaries of ambient air of the source in question. In your letter, you correctly identified the definitions of ambient air from both the Code of Federal Regulations and the Iowa Administrative Code. While the codified definitions are somewhat different, by policy these definitions are exactly the same. Specifically, in a December 19, 1980 letter to Senator Jennings Randolph (attached), EPA noted that they were retaining their policy to exclude "...land owned or controlled by the source..." from ambient air. There is no evidence that this policy has been changed in the nearly 40 years since this letter was written. It should be noted that this policy is specific to the source owning or controlling the land not the parent company of the facility.

Historically, the Department has considered Cargill's Corn Wet Mill and Vitamin E plant as separate sources for PSD and Title V purposes. However, there is no evidence in the record that the criteria listed in the definition of stationary source have undergone a formal review to determine if these facilities should be considered a single stationary source. At this time nothing has triggered the need to review that determination. As a result, the Department has requested that Cargill submit the modeling analysis representing the Vitamin E plant as "ambient air" for the Corn Wet Mill. In the modeling analyses that have been submitted for this project, Cargill has continued to exclude the property associated with the Vitamin E plant from ambient air.

In your letter you state that it is your opinion that since Cargill owns and operates all the property that this should somehow mean that access to the general public has been limited. It is important to again

note that Cargill is not the source. There are two sources in this situation, Cargill's Corn Wet Mill and Cargill's Vitamin E plant. Employees of neighboring facilities are members of the general public. As a result, employees of Cargill's Vitamin E plant are considered members of the general public as related to the Cargill Corn Wet Mill under the current situation. Therefore, the general public (as related to the Corn Wet Mill) would have access to the Vitamin E plant.

Further, in your letter you argue that the Department should consider following the EPA guidance on leased land which you provided supporting the analysis of the HF Chlor-Alkili facility as well. You state this should be followed because the Wet Corn Mill controls access to the property. However, the Department has asked for any binding contracts or leases between the Corn Wet Mill and the Vitamin E plant. When that request was made we were informed no such agreements existed. Without any binding legal contracts or leases that outline the specific requirements and expectations of each party, it is impossible to conclude whether one entity has the control over the other. Furthermore, the leased land memo expressly states that the first step necessary is to make a formal determination as to whether the facilities should be considered one source or two sources. Cargill has stated they did not want the Department to proceed with a formal review of what constitutes a single stationary source at this time. As a result, it would be difficult for the Department to apply the leased land policy without being able to perform the first step of the analysis.

In support of your arguments you noted two examples of complexes in the State of Nebraska that you felt supported your position. Department staff has discussed these examples with our counterparts in the Nebraska DEQ and our analysis of these examples is discussed below and in the attached modeling technical review document.

AGP Hastings Nebraska

AGP was originally permitted to construct a new corn dry mill ethanol plant on property adjacent to an existing AGP-owned soybean processing plant in Hastings Nebraska. These plants initially were permitted as separate stationary sources. However, according to Nebraska DEQ staff, the original permitting of these facilities had been completed in error. Upon recognition of this, appropriate compliance action was taken and the dry mill ethanol plant was later permitted as a major modification of the existing major source (IE two operations were considered a single stationary source). As a result, NDEQ staff suggested that the original permitting of this facility not be used an example of appropriate permitting review.

However, DNR modeling staff did obtain modeling files from the Nebraska DEQ and review them. The summary of this analysis is outlined in the attached document.

Give that the recent appropriate permitting action by Nebraska DEQ resulted in the Soybean Plant and the Dry Mill Ethanol facility being considered a single stationary source. Also considering the modeling analysis contained emissions from both the Soybean Plant and the Dry Mill Ethanol facility were all included as emissions from the stationary source. The Department has concluded that this example does not support the position that the full extent of the property boundary should be used.

Cargill Blair Nebraska

It is our understanding that Nebraska DEQ considered there to be five separate sources located within this industrial complex. These include three facilities owned by separate companies, Cargill's corn

processing and ethanol plants and a source comprised of Cargill's Polyol facility, Cargill's Lactic Acid Plant, and a joint venture under the name NatureWorks. The DNR did not review the basis for the single source determinations.

During our discussions with the Nebraska DEQ we became aware that they had developed a site specific guidance document (attached) relating to ambient air boundaries in this industrial complex. This guidance was reportedly developed with the assistance of EPA Headquarters and EPA Region 7 staff. A review of this document reveals that it only addresses the ambient air boundaries, not the emissions that should be modeled in an analysis and it only addresses this issue relative to leased land and joint ventures. This document does not address how to model two separate nearby stationary sources. This memo does not modify the existing policy as it relates to the ambient air boundary of independent separate stationary sources that do not have a binding legal document outlining their relationship.

Department modeling staff also obtained modeling files for the referenced project at this location and concluded that it was inconclusive in supporting the position stated in your letter because only a significant impact analysis was performed which does not include all sources or the full extent of the property boundary in the analysis.

Given that the Department has concluded that your examples are either not supportive of your position or inconclusive, our position remains unchanged. As a result we have three potential options moving forward including:

- Seeking further guidance from USEPA Region 7 staff relating to the appropriate boundaries for ambient air;
- Make a formal stationary source determination for the wet mill and the vitamin E plant before completing the modeling analysis to determine if that would result in different ambient air boundaries in this situation;
- Or proceed with modeling the two facilities as separate sources and complete the modeling analysis as stated in our August 2016 communications.

Please let us know how you would like to proceed with the review of this project. If you have any questions or need clarification on the information provided, let me know.

Sincerely,

Corey Detter

Corey Detter, P.E.
Environmental Engineer
Air Quality Bureau

Enclosures

57902-C 12

M E M O R A N D U M

TO: Permit File #57902

CC: Shelley Kaderly, Clark Smith

FROM: Will Adler WA

DATE: 5/5/06

RE: Cargill / Joint Ventures Complex – Ambient Air Boundaries; Decision Memo, (Facility #57902)

This memorandum addresses the Departments decision in regards to the Cargill / Joint Ventures (JV) Complex ambient air boundaries.

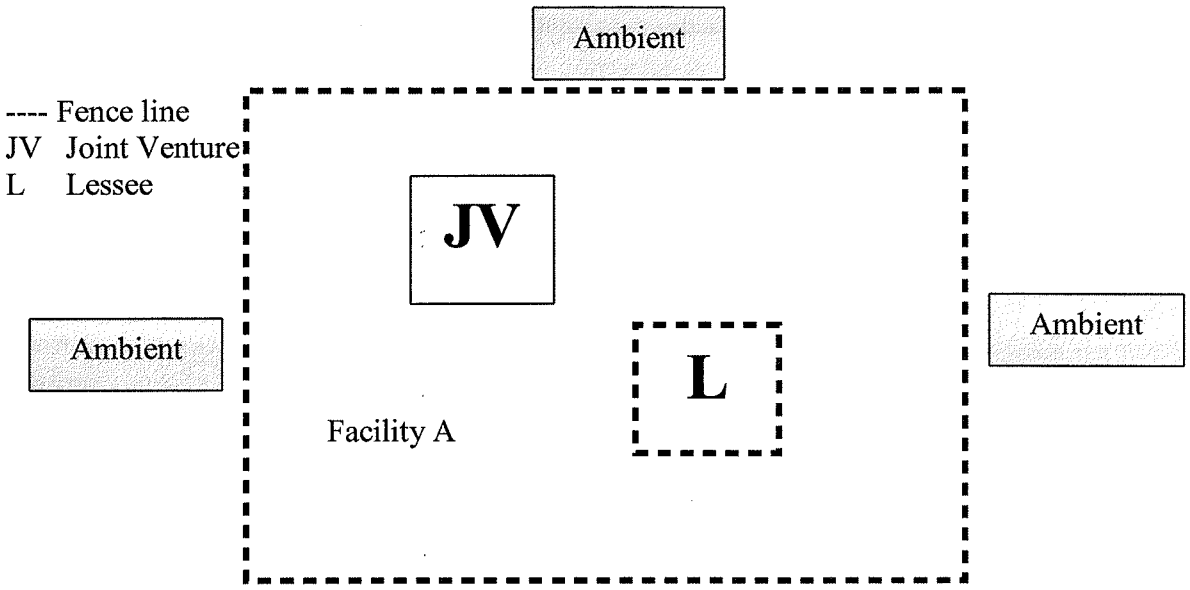
The issue of ambient air boundaries of the Cargill / JV Complex has come up in the past. The NDEQ along with the help of Cargill, EPA HQ, and EPA Region VII have developed a conclusion that will address the question "What is the ambient air boundary for the Complex or Facility". The following conclusion has been developed to address the question of ambient air boundaries and where to begin modeling ambient air.

In conclusion, the Cargill facility expanding or modifying the modeled ambient air will begin at the Cargill fence line. If Cargill turns over control of the property access to a Lessee or to anyone else in the Complex, Cargill then loses the ability to claim that area as their ambient boundary.

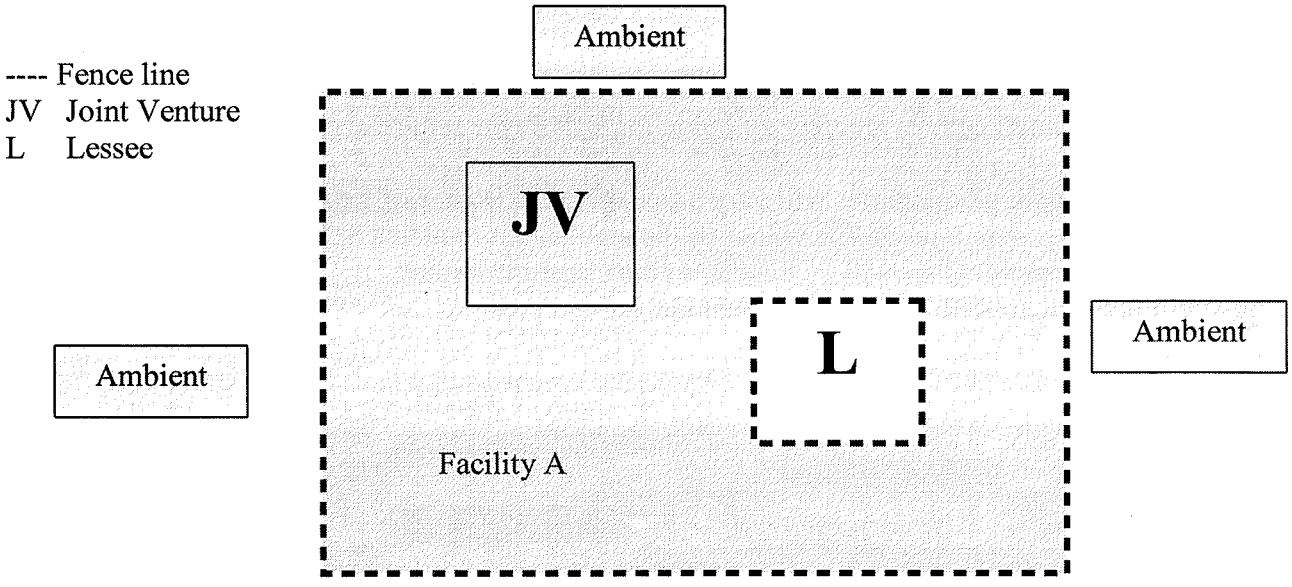
The Joint Ventures at the Cargill Complex will be modeled exactly the same as the Cargill facility. The Joint Ventures ambient air modeling will begin at the Cargill fence line.

A Lessee's modeling boundaries will vary based on the existence of Lessee having a fence line or not. A Lessee with a fence line will have the ambient air modeled beginning at the Lessee fence line. The ambient air will include all of the Cargill Complex. A Lessee that has no fence line will have all areas modeled as ambient air.

You will find below the a few examples of possible scenarios that have been approved as possible ambient air boundaries of the Cargill Complex.

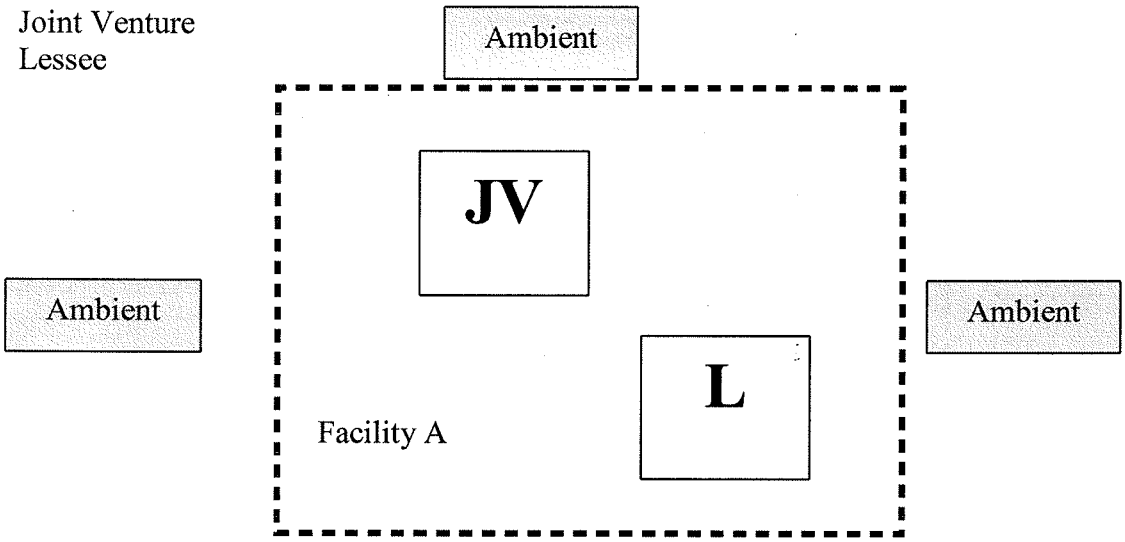


Scenario 1:
Facility A is expanding, and has control over who has access of who enters larger property area. Lessee (L) has fence around it, therefore has restricted access from anyone from Facility A or Joint Venture JV from accessing its property, even though Lessee L has access to Facility A's property.
Facility A models to its own fence line for ambient impacts and does not include Lessee L's land as if it is ambient, because it is the owner of the land and controls access to it



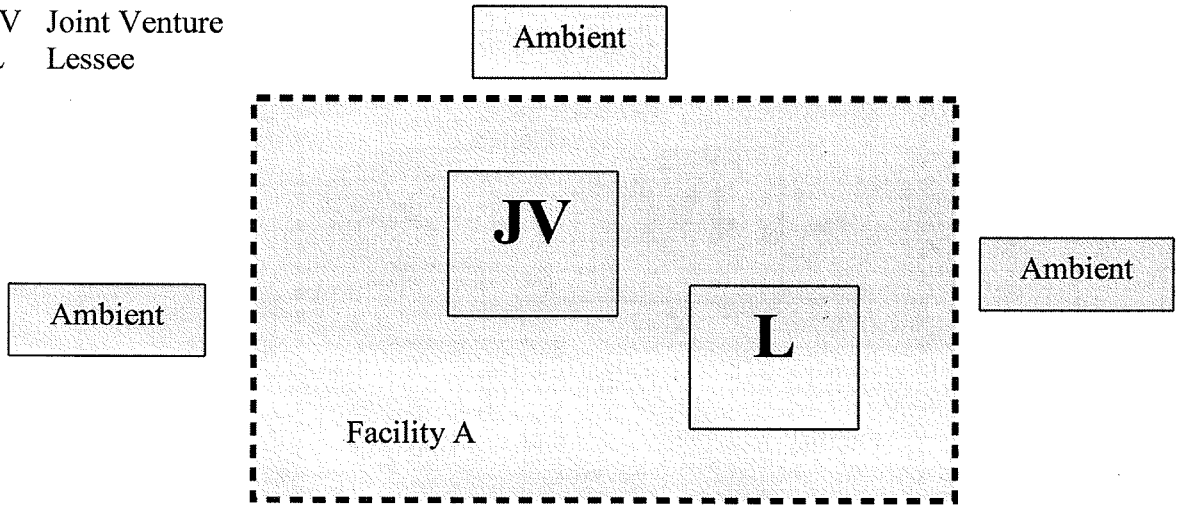
Scenario 2:
Lessee wants to expand. Lessee L has a fence. Lessee models boundary of leased land as ambient boundary line.

---- Fence line
JV Joint Venture
L Lessee



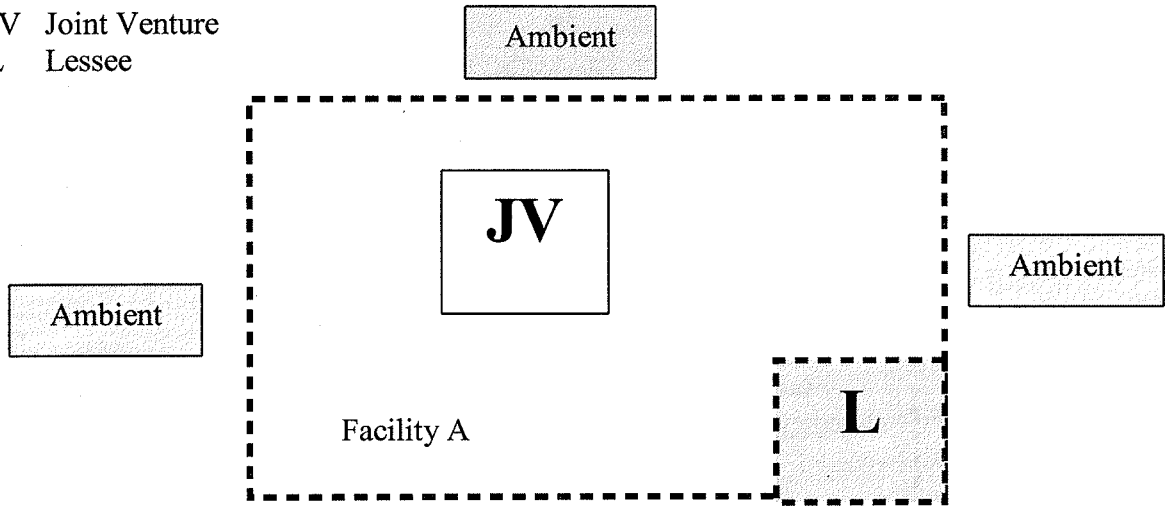
Scenario 3:
Facility A expands; Lessee L doesn't have a fence. Facility A uses their property boundary that is fenced as the point to determine ambient air.

---- Fence line
JV Joint Venture
L Lessee



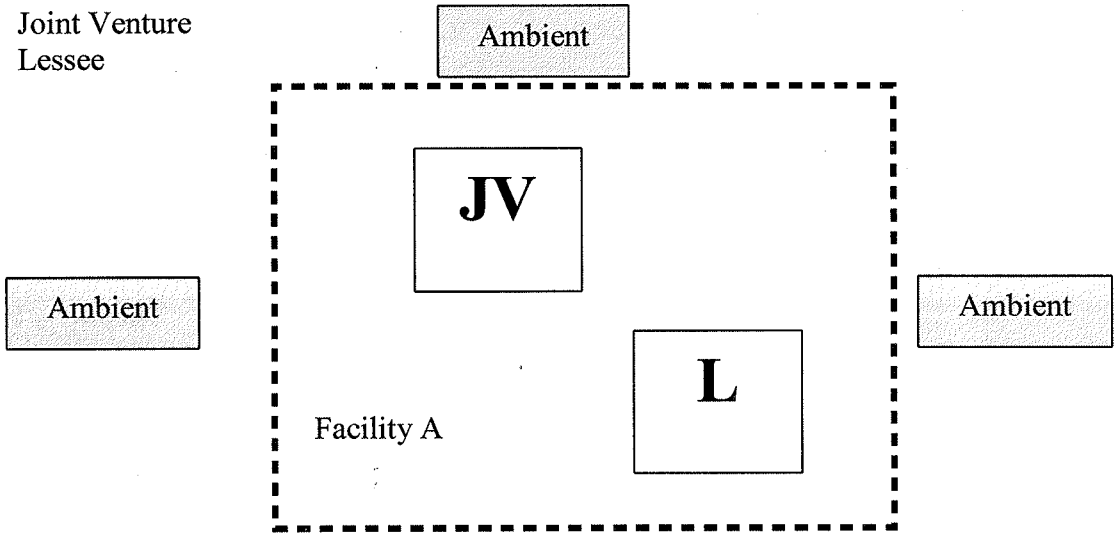
Scenario 4:
Lessee L wants to expand. Lessee L doesn't have a fence. Everything is ambient to Lessee L.

---- Fence line
JV Joint Venture
L Lessee



Scenario 5:
Facility A turns over control of the property access to a Lessee or to anyone else, and then they lose the ability to claim that as their ambient boundary. Such as an "external" gate that Lessee directly controls access to their leased property without going through Facility A's gate(s).

---- Fence line
JV Joint Venture
L Lessee



Scenario 6:
Joint Ventures are treated as if they were the same as Facility A, since Facility A has a financial interest in the Joint Venture.

Analysis of Cargill Permitting Examples and Supporting Documents

According to EPA's guidelines in Appendix W subpart 9.2.2

"Under the PSD permitting program, an air quality analysis for criteria pollutants is required to demonstrate that emissions from the construction or operation of a proposed new source or modification will not cause or contribute to a violation of the NAAQS or PSD increments. i. For a NAAQS assessment, the design concentration is the combination of the appropriate background concentration (section 8.3) with the estimated modeled impact of the proposed source. The NAAQS design concentration is then compared to the applicable NAAQS."

This provision emphasizes why it is important to have an accurate representation of all emissions in the area of interest.

Hastings, NE Permitting Example

Modeling conducted for the AGP soybean facility in Hastings, NE was modeled as if both AGP facilities were one source. While receptors were not placed on either the soybean or the corn facility, emissions from both facilities were included in the model. In Eddyville, this analysis would be similar to modeling emissions from both the Cargill and Vitamin E facilities with receptors placed outside of Vitamin E and Cargill's property.

Figure 1 is a visual depiction on how the soybean facility was modeled with the corn facility. The light blue dots and red square represent emission sources and the purple and yellow plus signs represent receptors located in ambient air.

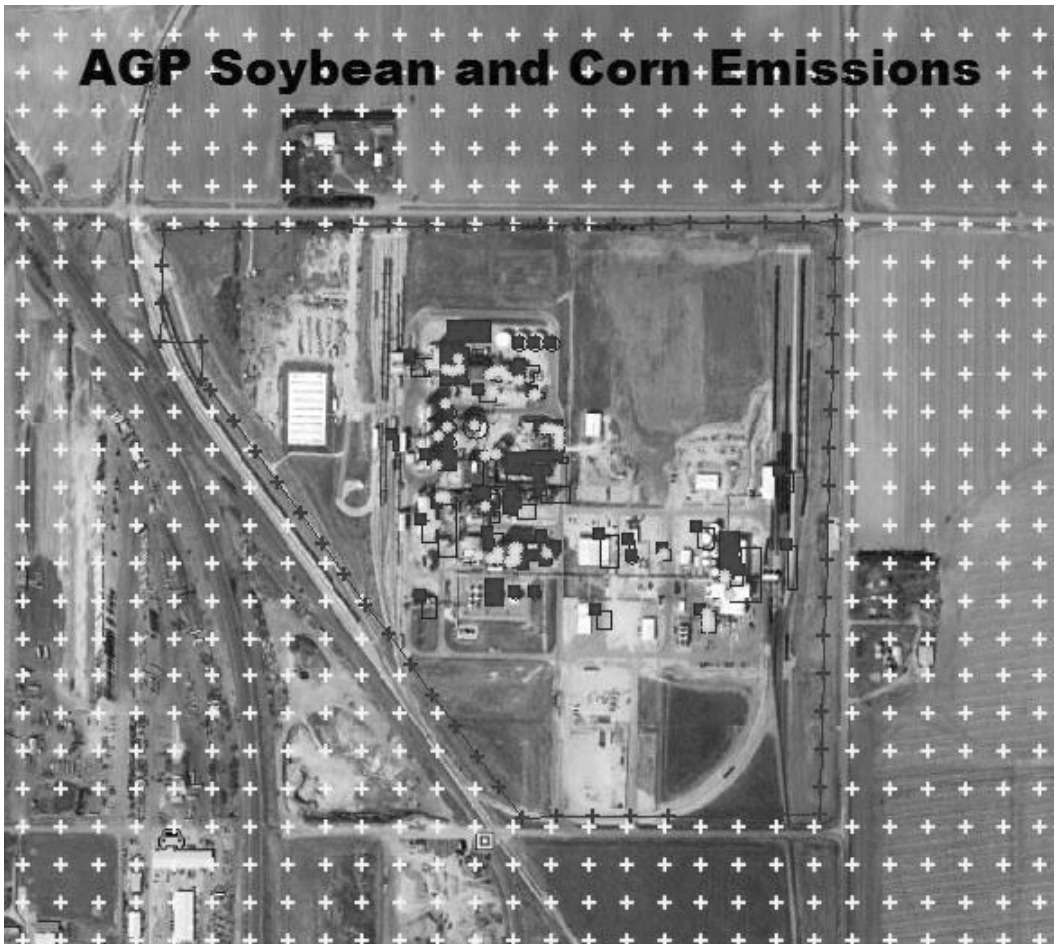


Figure 1

Blair, NE Permitting Example

The Cargill modeling conducted in Blair, NE was a significance analysis which only includes the project sources being permitted or modified. For this analysis only the Fiber Dryer was included. This modeling analysis also used a screening model, AERSCREEN, which uses distance to ambient air instead of property boundaries.

Figure 2 is a visual representation of the area. The lighter yellow shading is Cargill's property based on data obtained from the Washington County accessor's site. The darker orange shading is an approximation of the property leased to Novozymes. The yellow push pin is the fiber dryer location. The yellow circle around the push pin represents the distance to ambient air used in the screening model.

This indicates that the edge of the property owned by Cargill, as opposed to the leased land occupied by Novozymes, was used as the ambient air boundary. This modeling analysis supports that leased land is not ambient air to Cargill but does not show what emissions would be included in a comprehensive model for Cargill. Therefore this modeling analysis is inconclusive on the ambient air definition.

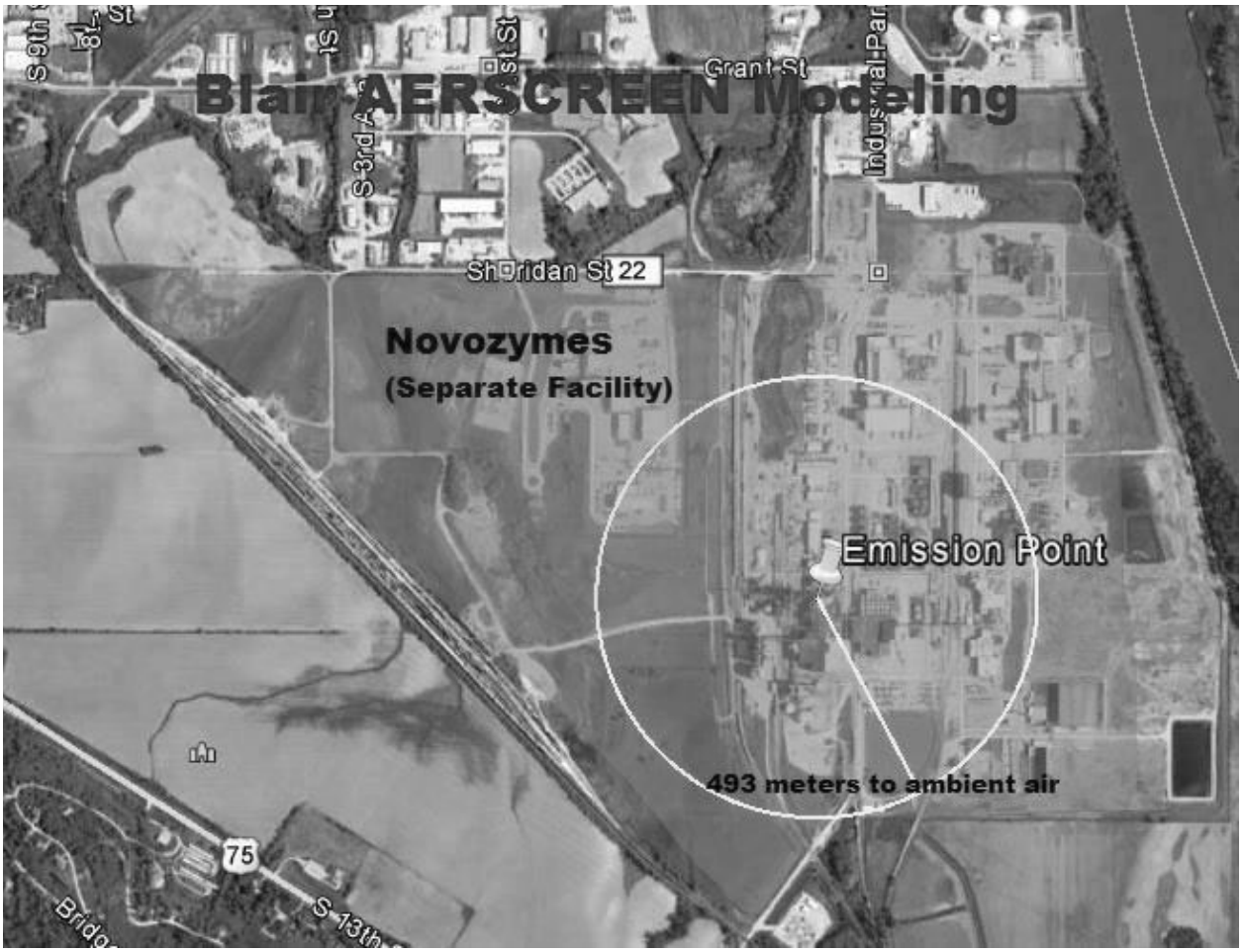


Figure 2

Comments on EPA's leased land guidance and the NDEQ memorandum titled "Cargill/Joint Ventures Complex – Ambient Air Boundaries"

The EPA leased land guidance (Interpretation of "Ambient Air" In Situations Involving Leased Land under the Regulations of Prevention of Significant Deterioration (PSD)) and Nebraska Department of Environmental Quality (NDEQ) decision memorandum ambient air boundaries at the Cargill/Joint Ventures Complex (NDEQ Facility #57902) are not applicable to the Vitamin E facility because Cargill wholly-owns Vitamin E. Vitamin E is no longer a joint venture and the land is not leased from Cargill. All of the examples in both the EPA guidance and memorandum deal with joint ventures and leased land. Additionally, the first sentence of the EPA guidance document summarizes the first step in determining an ambient boundary determination, which is applicable in all cases involving multiple facilities, not just those including leased land:

"As a threshold matter, in order to identify the boundary between a source and ambient air in a leased-land scenario, it is important to determine whether you are dealing with one source or two (or more) sources."

Therefore it is important for Cargill to determine whether they would like the Cargill and Vitamin E facilities to be treated as one source or two sources.

Next Steps

The information provided to date by Cargill does not change the request made by DNR in August 2016 regarding dispersion modeling for this project. Cargill needs to model this project to determine the possible impact of the proposed project on air quality in the area. In this modeling analysis receptors need to be placed on Vitamin E's property but no Vitamin E emissions need to be included when modeling Cargill's impact on the neighboring facilities.

Additionally, the impact on shared ambient air from Cargill, Vitamin E, Ajinomoto Heartland and Ajinomoto North America combined will need to be modeled. This should be accomplished using an analysis that includes sources at all facilities with no receptors on any modeled facility property.

Exhibit BB-1

December 19, 1980

Honorable Jennings Randolph
Chairman, Committee on Environment
and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your letter of October 23, 1980 expressing your continued interest in the Agency's definition of "ambient air." During the time since David Hawkins, my Assistant Administrator for Air, Noise, and Radiation, met with you last February, the definition has been extensively reviewed and debated.

After reviewing the issues and alternatives, I have determined that no change from the existing policy is necessary. We are retaining the policy that the exemption from ambient air is available only for the atmosphere over land owned or controlled by the source and to which public access is precluded by a fence or other physical barriers. EPA will continue to review individual situations on a case-by-case basis to ensure that the public is adequately protected and that there is no attempt by sources to circumvent the requirement of Section 123 of the Clean Air Act.

I hope that this has been responsive to your needs.

Sincerely yours,

/s/ Douglas M. Costle

Douglas M. Costle

American
Fuel & Petrochemical
Manufacturers

1800 M Street, NW
Suite 900 North
Washington, DC
20036

202.457.0480 office
202.457.0486 fax
afpm.org

January 11, 2019

U.S. Environmental Protection Agency Headquarters
1200 Pennsylvania Avenue NW
Washington, D.C. 20004

Re: Draft Guidance: Revised Policy on Exclusions from "Ambient Air"

To Whom It May Concern:

The American Fuel & Petrochemical Manufacturers (AFPM) submits the following comments regarding the Revised Policy on Exclusions from "Ambient Air" (the "Policy"). AFPM is a national trade association whose members comprise virtually all U.S. refining and petrochemical manufacturing capacity. AFPM's member companies produce the gasoline, diesel, and jet fuel that drive the modern economy, as well as the chemical building blocks that are used to make millions of products that make modern life possible.

AFPM member companies are subject to a broad range of regulatory programs, including air, water, and solid waste regulations overseen by the Environmental Protection Agency (EPA). We support EPA efforts to modernize, simplify, and streamline regulatory compliance. The proposed revisions to the Policy will provide the flexibility and clarity the refining and petrochemical sectors require in determining what constitutes "ambient air" in the context of both the New Source Review Program (NSR) and the application of the National Ambient Air Quality Standards (NAAQS).

EPA's New Source Review regulations do not define the term "ambient air" but instead rely on the general regulatory definition of the term "that portion of the atmosphere, external to buildings, to which the general public has access."[1] A 1980 letter from then-Administrator Douglas Costle to Senator Jennings Randolph has set ambient air policy for the past thirty-nine years by stating that " the exemption from ambient air is available only for the atmosphere over land owned or controlled by the source and to which public access is precluded by a fence or other physical barriers."[2] The policy is grounded on an interpretation of the regulatory phrase " to which the general public has access" and at that time a fence or physical barrier was the most available/common/viable means to limit access to an area.

EPA's proposal correctly recognizes that the 1980 Administrator Costle letter is overly restrictive considering the vast improvements made in public notice, surveillance technologies,

[1] 40 C.F.R. § 50.1(e).
[2] *See* Letter from EPA Administrator Douglas Costle to the Honorable Jennings Randolph, Chairman, Committee on Environment and Public Works, December 19, 1980.

and access control over the past 39 years. For example, in 1980 video monitoring and other electronic surveillance technologies were uncommon. These technologies do not necessarily rely upon "a fence or other physical barrier," and consequently call into question the necessity of physical barriers and the incremental benefit such barriers provide to the general public. AFPM supports the proposed Policy that would allow for new technologies that can serve as effective surrogates to physical barriers.

The origination of the "physical barrier" concept is a 1972 Memorandum of Law issued by the EPA Office of General Counsel which interprets the definition of "ambient air" in 40 CFR section 50.1(e).[3] In that memorandum, EPA addressed "the meaning of the phrase 'to which the general public has access' in EPA's definition of 'ambient air'?"[4] with the statement, "We believe that the quoted phrase is most reasonably interpreted as meaning property which members of the community at large are not physically barred in some way from entering."[5] EPA further clarifies:

> "EPA's regulations prescribing national primary and secondary ambient air quality standards define "ambient air" to mean "that portion of the atmosphere, external to buildings, to which the general public has access." 40 CFR 50.1 (e). What definition in our view limits the standards' applicability to the atmosphere outside the fence line, since *"access" is the ability to enter*[6] (emphasis added). In other words, areas of private property to which the owner or lessee has not restricted access by physical means such as a fence, wall, or other barrier can be trespassed upon by members of the community at large. Such persons, whether they are knowing or innocent trespassers, will be exposed to and breathe the air above the property."[7]

Based on this discussion, it is clear that the ability to limit access is the key component of defining those areas that do not qualify as ambient air. The concept of a physical barrier was only introduced as the means to execute how the ability to limit access would be established. This distinction between the condition of "access" and how it is implemented is critical, as they are not equivalent. Nevertheless, this guidance, and the resulting policy implementation over the last several decades, has implied the two to be the same. The presence of a "physical barrier" has become the de jure condition of preventing access. In some instances, the "physical barrier" concept has been so critically interpreted to imply that such barriers must be substantial enough

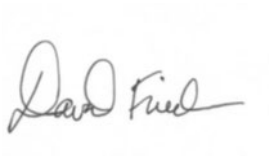
[3] *See* Letter from Michael James, Attorney, Air Quality and Radiation Division to Jack Farmer, Chief, Plans Management Branch, SDID, September 28, 1972. (James Letter).
[4] *Id*.
[5] Id.
[6] "Webster's Third New International Dictionary (1966) defines "access" to mean "Permission, liberty, or ability to enter.""
[7] See James Letter, p. 2.

to prevent willful trespass.[8] Moreover, the 1980 interpretation strays too far from the regulation itself, which focuses on the general public's access to the area. A no trespassing sign should be adequate to limit access to the area. If an individual is willing to ignore the sign, perhaps that same scofflaw would be willing to jump a fence.

The original interpretations set an unreasonable standard for preventing access. EPA is correcting this historical interpretation by recognizing that limiting access, and thus what constitutes "ambient air," can be accomplished in a variety of ways not limited to "physical barriers." AFPM supports this policy improvement and further recommends that EPA codify this position in both the NSR and NAAQS regulations, as appropriate.

Thank you for your consideration of these comments. Please feel free to contact me at 202-844-5508 or dfriedman@afpm.org if you have questions or need further information.

Sincerely,



David Friedman
Vice President, Regulatory Affairs
American Fuel & Petrochemical Manufacturers

[8] Letter from Donald Toensing, Chief, Air Permitting and Compliance Branch, EPA Region VII to W. Clark Smith, Supervisor, Air Quality Permitting Section, Nebraska Department of Environmental Quality, August 1, 2000.

Alcoa

Alcoa

201 Isabella Street
Pittsburgh, PA 15212

Delivered via:
Electronic Mail: *Ambient_Air_Guidance@epa.gov*

January 11, 2019

William L. Wehrum, Assistant Administrator Air and Radiation
Office of Air and Radiation, U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460
ATTN: Informal Docket for EPA's Draft "Revised Policy on Exclusions from 'Ambient Air'"

Re: Comments on Environmental Protection Agency's (EPA) Draft Guidance on "Ambient Air"

Dear Mr. Wehrum:

Alcoa Corporation (Alcoa) is pleased to submit the following comments on the Environmental Protection Agency's (EPA's) "Draft Guidance: Revised Policy on Exclusions from 'Ambient Air'," released for stakeholder review on November 8, 2018.

Alcoa is one of the world's largest producers of aluminum, with forty operating locations across ten countries[1] with approximately 14,000 employees. For years, Alcoa has been an active participant in the development of EPA standards either individually or through participation in industrial trade groups.

Alcoa's business is primarily focused on bauxite mining, alumina refining, and aluminum smelting. Our comments on the Draft Guidance: Revised Policy on Exclusions from "Ambient Air" are important to our ongoing businesses in the United States because state and local regulatory authorities rely upon and utilize EPA guidance to implement the environmental standards under their purview. How the regulatory authorities apply EPA's guidance directly affects Alcoa.

Comments on EPA's Draft Guidance on Ambient Air

Alcoa is a member of industrial trade associations, such as The Aluminum Association and the Council of Industrial Boiler Operators (CIBO). These associations, in cooperation with other like-minded industrial trade associations, collectively provided comments on EPA's November 2018 document titled, Draft

[1] Alcoa Corporation 2017 Annual Report, Form 10-K, Part 1, Item 1. Business.

Revised Policy on Exclusions from "Ambient Air."[2] Alcoa endorses the trade associations' comments filed on the November 2018 draft policy.

Practical access as outlined in the referenced comments should be the standard used to determine areas of ambient air.

Alcoa supports the discussion in the referenced comments that practical access by the general public should be the standard used to determine areas of ambient air. Specific examples of areas that are not owned by the source, but which are practically limited from access by the general public and which consequently do not meet the definition of ambient air (*"that portion of the atmosphere, external to buildings, to which the general public has access"*) include the following:

- Exclusion zones, as established by the U.S. Coast Guard, other agency or through posted signage, around industrial piers, dams and similar areas. These areas are not accessible to the general public and should not be considered ambient air.
- Industrial sites are not accessible to the general public and should not be considered ambient air. So, even if outside of the legal control of the source, neighboring industrial sites are not ambient air.

"Measures" that preclude access by the general public should be considered, regardless of who is responsible for the measure.

Any measure that exists, whether naturally occurring, established by a stationary source involved an air quality analysis, or any other private, public, or governmental entity should be treated equally for purposes of determining exclusions from "ambient air." A "measure" as defined by the revised policy guidance need not be an action of a particular stationary source to have the same effect of precluding or deterring the public's access. Accordingly, the revised policy guidance should make clear that any measure that deters or precludes the public's access to an area shall be considered when establishing exclusions from ambient air.

Areas which are transient in nature should be excluded as model receptors where appropriate.

There are areas that may be accessible to the general public but which are transient in nature. These areas should not be used as model receptor sites for pollutants when the form and averaging period of the standard do not match the expected time period of occupation by a member of the general public. For example, sections of public highway which do not have adjacent sidewalks and/or commercial establishments in areas of low population density are transient areas. People travel through these areas, typically in vehicles, but are not likely to remain in these areas. Modeling done for 1-hour primary NAAQS attainment, for example, should exclude these areas as modeled receptors since occupancy of the area is transient. NAAQS standards are probabilistic in nature and model design should take into consideration site specific conditions in establishing model receptor sites.

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[2] https://www.epa.gov/nsr/forms/draft-guidance-revised-policy-exclusions-ambient-air

We appreciate this opportunity to comment on the Draft Guidance: "Revised Policy on Exclusions from 'Ambient Air'." If you have any questions regarding these comments, please contact me by phone at 804-450-6193 or by e-mail at laura.coleman@alcoa.com.

Sincerely,

Laura A. Coleman
Environmental Director

Department of Environmental Quality

To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.

DEQ

Mark Gordon, Governor

Todd Parfitt, Director

January 11, 2019

Acting Administrator Andrew Wheeler
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Submitted electronically to Ambient_Air_Guidance@epa.gov

RE: Revised Policy On Exclusions from "Ambient Air" Draft Guidance

Dear Acting Administrator Wheeler,

In the draft guidance titled *Revised Policy on Exclusions from "Ambient Air"* (Guidance), the U.S. Environmental Protection Agency (EPA) has proposed updates that may be used to assess whether measures to prevent the general public's physical or practical access to land owned or controlled by the source are sufficient under the circumstances to exclude an area from EPA's regulatory definition of ambient air. The Wyoming Department of Environmental Quality, Air Quality Division (AQD) appreciates the opportunity to comment on the Guidance.

AQD acknowledges the EPA's historical policy relies on fences to restrict access. However, fences may also create hazards and barriers for Wyoming wildlife.[1] Therefore, the AQD supports EPA's Guidance update that recognizes that measures other than a fence or other physical barrier may effectively prevent physical or practical access.

EPA is updating its Guidance in order to provide air agencies with "greater flexibility in determining where to place modeling receptors for air quality analyses" for the issuance of federal Prevention of Significant Deterioration (PSD), while also ensuring that public health protection is maintained.[2] It is unclear from the Guidance whether EPA may also apply it in the ambient monitoring context. Given that considerations for application in the ambient monitoring context may benefit from additional analysis, the AQD suggests that EPA seek additional input and comment before broadly extending application of the Guidance to other contexts such as ambient monitoring.

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[1] *A Wyoming Landowner's Handbook to Fences and Wildlife, Practical Tips for Fencing with Wildlife in Mind,* 2nd Ed. (2015), available at https://wgfd.wyo.gov/WGFD/media/content/PDF/Habitat/Habitat%20Information/Grazing%20Management%20and%20Prescribed%20Burning/A-Wyoming-Landowner-s-Handbook-to-Fences-and-Wildlife_2nd-Edition_-lo-res.pdf, (site visited 1/11/2019).

[2] EPA, *Revised Policy on Exclusions from "Ambient Air" at pgs.* 5 and 7.

AQD also suggests that EPA consider updating the "general public" and "legal access" conceptual elements of the ambient air regulatory definition in order to address land-ownership scenarios prevalent in the Western United States. These land-ownership scenarios typically involve the intersection of, or shared boundaries between, federally-owned and privately-owned lands. These land-ownership scenarios may include instances where public roadways pass through privately owned land, such as a railway corridor that passes through a mine; or where Facility A and Facility B and the only way to access Facility B is to go through Facility A; or where federally-owned lands completely surround privately owned lands. Additional complexities also arise under various surface and sub-surface lease scenarios. Clarifying these elements of the Guidance would assist the AQD and other western air agencies when evaluating these scenarios.

Thank you for the opportunity to comment on this Guidance. As always, AQD is available to discuss any of the comments in this letter. Please feel free to contact me at 307-777-7391.

Sincerely,

Nancy Vehr
Air Quality Division, Administrator

Cc: Todd Parfitt, Wyoming Department of Environmental Quality, Director

American Forest & Paper Association

January 11, 2019

Submitted *via* email to Ambient_Air_Guidance@EPA.gov

Subject: Comments on EPA's *Draft Revised Policy on Exclusions from "Ambient Air"* (Nov. 9, 2018)

The American Forest & Paper Association (AF&PA), the Air Permitting Forum (the Forum), the Auto Industry Forum, and the American Wood Council (AWC) are pleased to submit these comments on EPA's November 9, 2018 *Draft Revised Policy on Exclusions from "Ambient Air"* ("Draft Revised Policy") under the Clean Air Act ("CAA" or "the Act"). Provided below is brief background on each of these groups, which are collectively referred to as "the Associations" throughout these comments, and the key recommendations for improving the Draft Revised Policy. The revision is appropriate given (1) that EPA's historical policy, which was developed in the 1970s, reflected a "brick and mortar" approach to the analysis that is no longer appropriate as we approach 2020 and (2) current national ambient air quality standards ("NAAQS") are in a probabilistic form that did not exist when the ambient air policies were originally formulated and implemented. The attachment further expounds on these general comments on the Draft Revised Policy.

The American Forest & Paper Association ("AF&PA") serves to advance a sustainable United States pulp, paper, packaging, tissue and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative—*Better Practices, Better Planet 2020*. The forest products industry accounts for approximately four percent of the total United States manufacturing Gross Domestic Product ("GDP"), manufactures over $200 billion in products annually and employs approximately 950,000 men and women. The industry meets a payroll of approximately $50 billion annually and is among the top 10 manufacturing sector employers in 45 states.

The Forum, established shortly after the Clean Air Act Amendments of 1990, is a coalition comprised of companies focused on implementation issues under the CAA, including pre-construction New Source Review ("NSR") and Title V permitting, as well as standard-setting under the NAAQS, National Emission Standards for Hazardous Air Pollutants ("NESHAP"), New Source Performance Standards ("NSPS") and Existing Source Performance Standards ("ESPS") programs. The Forum members own and operate manufacturing plants and are subject to numerous CAA regulatory requirements, including ambient air modeling.

The Auto Industry Forum is a trade association of major automobile and light duty truck manufacturers with operations in the United States. Auto Industry Forum members operate facilities throughout the country that are subject to NSR and PSD permitting and have encountered challenges under EPA's implementation of its ambient air definition.

The American Wood Council ("AWC") is the voice of North American wood products manufacturing, an industry that provides almost 450,000 men and women in the United States with family-wage jobs. AWC represents 86 percent of the structural wood products industry, and members make products that are essential to everyday life from a renewable resource that absorbs and sequesters carbon. Staff experts develop state-of-the-art engineering data, technology, and standards for wood products to assure their safe and efficient design, as well as provide information on wood design, green building, and environmental regulations. AWC also advocates for balanced government policies that affect wood products.

The Associations appreciate and support the U.S. Environmental Protection Agency's ("EPA" or "the Agency") willingness to update and modernize its historical approach to evaluating the impacts of projects on ambient air. Clarifying how EPA is interpreting the definition of ambient air is a good first step in this modernization process. EPA is appropriately anticipating ever-evolving technologies and other innovations as well as recognizing natural or other ways that mean there is a low likelihood that the general public will be accessing privately-owned or managed property.

As the Draft Revised Policy indicates, site-specific circumstances should be taken into account and companies should not be required to place receptors under the auspices of "ambient air" where natural, man-made, or jurisdictional barriers or hazards mean that it is not generally anticipated that the general public will be accessing the property.

Specifically, the draft guidance states that

> it is appropriate to exclude *the atmosphere over land owned or controlled by the stationary source, where the owner or operator of the source employs measures, which may include physical barriers, that are effective in deterring or precluding access to the land by the general public.*

The Associations agree with the basic concept we believe EPA is trying to implement with this language (*i.e.*, that the general public should not and typically does not trespass on private property). Alternative language, however, would better implement the basic underlying principle that the company is treating the land as not accessible to the general public and is either communicating that intent or it is apparent. With that in mind, the Associations propose the following alternative language for consideration:

> it is appropriate to exclude *the atmosphere over land owned or controlled by the stationary source, where there is signage or other means of notice, which signal that the land should not be accessed by the general public, or*

measures/conditions (e.g., physical, geographic, surveillance) which can reasonably be expected to inhibit such access.

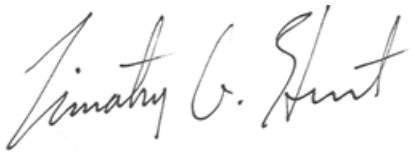
We also urge EPA to go further and provide guidance on modeling receptor locations to address lack of public exposure at a given location off-property consistent with the frequency or averaging time specified for the NAAQS or PSD increment that is under evaluation. This may be beyond the scope of the Draft Revised Policy, but as an important second step in addressing the problems in this area of EPA policy that have interfered with economic growth while not providing corresponding health or environmental benefits, EPA should provide off-property receptor-placement guidance that accounts for low risks and *de minimis* exposures while still being protective of human health and welfare. *Alabama Power v. Costle,* 636 F.2d 323, 360-61 (D.C. Cir. 1979) (agencies have implied de minimis authority to create even certain categorical exceptions to a statute when the burdens of regulation yield a gain of trivial or no value).

For the issues addressed in the Draft Revised Policy as well as for receptor placement, the Associations emphasize that EPA should be providing deference to state permitting agencies' judgment regarding access and model receptor placement.

The Associations support finalization of the Draft Revised Policy with the improvements requested in these comments. Thank you for your consideration of these comments and for your work on these complex issues.

Please feel free to contact Tim Hunt at 202-463-2588 for AF&PA and AWC and Robert Morehouse at 713-907-8080 for the Forum if you have questions or need more information.

Sincerely,



Timothy G. Hunt
Senior Director, Air Quality Programs
American Forest & Paper Association
American Wood Council

Shannon S. Broome
Executive Director
Air Permitting Forum
Auto Industry Forum

American Forest & Paper Association

DETAILED COMMENTS ON EPA'S *DRAFT REVISED POLICY ON EXCLUSIONS FROM "AMBIENT AIR"* (POSTED ON EPA WEBSITE NOV. 9, 2018)

INTRODUCTION

The American Forest & Paper Association (AF&PA), the Air Permitting Forum (the Forum), the Auto Industry Forum, and the American Wood Council (AWC) submit these comments on the November 9, 2018, U.S. Environmental Protection Agency (EPA or Agency) draft guidance entitled *Revised Policy on Exclusions from "Ambient Air"* (Nov. 9, 2018) ("Draft Revised Policy"). The Draft Revised Policy is intended to update and modernize EPA's policy for determining what areas may be excluded from the definition of ambient air under the Clean Air Act ("CAA" or "the Act"), which impacts how ambient air modeling is performed to demonstrate that a project or source will not cause or contribute to a violation of the national ambient air quality standards ("NAAQS") or consume Prevention of Significant Deterioration ("PSD") increment. EPA's interpretation of what constitutes "ambient air" has been of longstanding concern to the Associations, and we appreciate EPA undertaking this effort.

While we support EPA's efforts at reforming the problematic aspects of the historical approach, our comments below highlight areas where improvements would better accomplish the stated goals and/or be more reflective of statutory objectives. After providing background that explains the context for modernizing EPA's policy, these comments make the following points:

- EPA Has Discretion to Exclude Areas by Interpreting "Ambient Air" Reasonably.
- The Revised Policy Should be Clear that Natural Features and Notice Are Sufficient.
- The Revised Policy Should Make Clear that Permit Conditions are Not Required for a Measure/Feature to be Considered Sufficient.
- EPA Should Also Revisit Criterion 1: That the Source Owns or Controls Property, Giving it the Legal Right to Preclude Access.
- EPA Should Provide Additional Guidance to Address the Ambient Air Modeling Receptor Placement.

BACKGROUND

The Draft Revised Policy seeks to respond to longstanding stakeholder concerns regarding EPA's approach in individual permitting determinations related to the placement of model receptors for determining the extent to which a new major source or a major modification to an existing major source will affect attainment with NAAQS and increment in areas subject to the PSD program. Specifically, the draft would update and modernize the approach to assessing what is necessary to demonstrate that the "general public" is not being exposed in an area that is private property. The EPA's historical policy, which was developed in the 1970s, understandably reflected a "brick and mortar" approach that required access to be limited "by a fence or other physical barrier," with a fence being the preferred method. The 2019 world is far different from the 1970s world in which the individual permitting determinations were made that formed the origin for this interpretive policy.

Why revise the current policy?

- ***Increasingly stringent NAAQS make accuracy more important:*** EPA's work to modernize the policy is important because industrial facilities have encountered unnecessary challenges as they contemplate growth and expansion projects, particularly when they have been required to conduct air dispersion modeling analyses to demonstrate compliance with the NAAQS and PSD increments. Indeed, in some cases, these modeling requirements have resulted in costly facility changes with little to no benefit to air quality or public health. The ever-increasing stringency of the standards, including the NAAQS and PSD increments for fine particulate matter ($PM_{2.5}$, particles 2.5 micrometers or less) and the short-term (1-hour) NAAQS for sulfur dioxide ("SO_2") and nitrogen dioxide ("NO_2"), has exacerbated these problems and resulted in the unintended consequence of discouraging or preventing productivity/efficiency projects that would benefit the public health and welfare.[1] Indeed, with the issuance of newer short-term NAAQS and increment, and increasingly more stringent annual NAAQS and increment, modeling requirements can play a major role in prolonging the permitting process for both PSD and state-only projects, as states (at EPA's request, in many cases) may require sources to conduct modeling for the 1-hour NO_2, SO_2, and $PM_{2.5}$ NAAQS even for projects that are minor.

- ***Models Are Already Overly Conservative and Will Be Protective:*** In conducting an analysis for the PSD program, facilities are required to use EPA-approved models to demonstrate that a project will not cause or contribute to a violation of a NAAQS or increment. The EPA-prescribed methods lead to a modeling result that rarely approximates and typically significantly overestimates what actual concentrations would be near the facility. The new NAAQS for SO_2,

[1] *See, e.g.*, 42 U.S.C. § 7401(b)(1) (declaring one of the purposes of the CAA to be "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population").

NO_2, and $PM_{2.5}$ (including both the annual and daily $PM_{2.5}$ standards and the increments) have created urgency in addressing modeling conservatisms due to the stringency of these new standards. The overly-conservative assumptions embedded in the required modeling analyses result in theoretical exceedances of a NAAQS or increment that either lead to delays in the permit or deter efficiency improvements at existing plants all together. Reliance on modeling that over-predicts ambient concentrations also can result in additional unwarranted costs by causing facilities to install beyond-BACT (Best Available Control Technology) pollution control equipment, even though the assumptions used in the models and the predicted concentrations are not representative of real-world conditions.

- ***The Historic Policy (and Even the Draft Revised Policy) Exceed Statutory Requirements:*** Both EPA's outdated approach and the Draft Revised Policy are predicated on an approach that goes beyond what is required by the Act and the regulatory definition of ambient air by requiring general public access to private property to be affirmatively deterred or precluded. The Associations believe that this approach was based on the notion that taking steps to deter or preclude access are external indicators that show the public is not, in fact, generally accessing private property. The troubling aspect is that it assumes the public is not following the law by respecting the boundaries of private property. Over the years, the impact of this flawed premise has expanded and the EPA guidance has morphed beyond the basic "adverse possession" concepts that we believe originally underlay the policies into an affirmative obligation to do far more than manage property as private property. ***EPA's Draft Revised Policy is a clear step in the right direction*** by recognizing that "measures" other than fences and physical barriers effectively limit access, but it inadvertently continues to perpetuate that flawed premise underlying the original brick and mortar policy. Given the above, it is important for EPA to make clear that the "deter or preclude" language is not the legal standard required by the Act and should even go farther in the final guidance.

What core principles should govern EPA's policy? The following core elements should undergird any revised policy:

1. Recognize that modeling should generally not be required in areas where the general public is not supposed to be or is unlikely to be.[2] The orientation should not be an affirmative obligation to prevent access.
2. Communication that property is private through notice should be sufficient. Signage is a sufficient but not necessary indication that property is private.[3]

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[2] The Associations do not concede that simply being private property is insufficient. We understand that EPA is not addressing this issue at this time so focus these comments on the issues on which EPA seeks comment, but preserve this point for later discussion.

[3] EPA appropriately acknowledges, that signs demarking an area as private property (*e.g.*, No Trespassing signs) are sufficient to put the general public on notice that the property is private and access is not authorized such the posted area is excluded from ambient air. Draft Revised Policy at 6.

3. Recognize that natural barriers mean it is unlikely that the general public would be accessing the property.
4. Provide flexibility so states and EPA can adapt to technological and other advances without revising the policy again. The stagnation in EPA policy has been a needless deterrent to innovation and flexibility; the Draft Revised Policy will correct this error by allowing EPA to embrace innovation going forward.
5. Respect the authority of EPA's state partners by providing permitting agencies tools to assess on a case-by-case basis what should be included in the ambient air analysis.

1. EPA Has Discretion to Exclude Areas by Interpreting "Ambient Air" Reasonably.

The CAA does not define ambient air, but the Supreme Court deemed it to be "the statute's term for the outdoor air used by the general public."[4] Consistent with that interpretation, EPA has defined ambient air by regulation as "that portion of the atmosphere, external to buildings, to which the general public has access."[5] As EPA notes in the Draft Revised Policy, there are three core components to the definition: "external to buildings," "general public," and "access." It is the third element, "access", that has been the focus of EPA's guidance on what areas can be excluded.[6]

EPA's first guidance on access is found in the December 19, 1980 letter from then-EPA Administrator Costle to Senator Randolph, stating that "exemption from ambient air is available only for the atmosphere over land owned or controlled by the source and to which public access is precluded by a fence or other physical barriers."[7] Although this guidance has long been the fundamental tenet of the ambient air policy, it is neither mandated nor required by the statute. Under this historical interpretation, the only land excluded from the definition of ambient air is land (1) that the source owns or controls giving it the legal right to preclude access and (2) to which physical access is deterred

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[4] *Train v. NRDC*, 421 U.S. 60, 65 (1975).
[5] 40 C.F.R. § 50.1(e).
[6] Although the Draft Revised Policy is focused on "access," EPA should address, either in the Final Revised Policy of separate guidance, who the "general public" is that does not have access. EPA has acknowledged that employees, business invitees, and, in some cases, those with *de minimis* levels of access are not considered the "general public." Mem. from Stephen D. Page, Dir. Office of Air Quality Planning & Standards, EPA, to Reg'l Air Div. Dirs., Interpretation of "Ambient Air" in Situations Involving Leased Land under the Regulations for Prevention of Significant Deterioration (PSD), (June 22, 2007) ("2007 Guidance"), *available at* https://www.epa.gov/sites/production/files/2015-07/documents/leaseair.pdf. EPA should also acknowledge that the general public does not include those knowingly and illegally trespassing on private property. And as to those with *de minimis* levels of access, EPA should apply that interpretation to those entering a facility briefly or sporadically for business or public purposes that may be unrelated to the facility (*e.g.*, railroad workers, public utility workers, *etc.*). *See Alabama Power*, *infra*.
[7] Letter from EPA Adm'r Douglas Costle to Senator Jennings Randolph, Chairman, Comm. on Env't & Public Works, (Dec. 19, 1980).

or precluded by a fence or other physical barriers.[8] It is the second criterion that EPA is revisiting at this time.

EPA has interpreted the second criterion to be a practical or physical limitation on the ability of the general public to access the property as opposed to a legal preclusion (which is addressed by the first criterion).[9] Although neither the CAA nor the regulations require access to be deterred or precluded, a practical or physical limitation on access to the property is one method to make the public aware that the property is being managed as private and general access is not authorized. Typically, it has been interpreted and implemented to mean that there must be a robust fence of some sort that is not readily crossed for an area to be excluded, although there have been cases where other measures have been approved. Through case-by-case determinations, EPA has elaborated on what comprises an adequate "fence" or "effective physical barrier"[10] and ambient air determinations had begun to evolve from requiring a fence to determining that other physical barriers (*e.g.*, rugged terrain or security patrols) are likewise sufficient to limit general public access.[11] For example, surveillance has been deemed to be a sufficient barrier, most recently for a PSD permit for the Showa Denko Carbon facility in South Carolina, which reflects the capability of modern surveillance technology to limit public access as efficiently as an unattended fence.[12] Surveillance cameras are relatively inexpensive, operate in daytime and low light conditions, provide a wireless signal, and when combined with motion detection can provide constant observation over long and remote property boundaries. Facilities can effectively utilize surveillance technology to monitor public access.

The Draft Revised Policy would appropriately recognize that modern measures, such as surveillance technology, should be on the same footing as fences or physical barriers in determining ambient air exclusions. The Draft Revised Policy proposes "to exclude *the atmosphere over land owned or controlled by the stationary source, where the owner or operator of the source employs measures, which may include physical barriers, that are*

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[8] Draft Revised Policy at 3.

[9] *Id*.

[10] *See, e.g.*, EPA, *SO_2 Guideline Appendices* EPA-450/2-89-019, (Oct. 1989), *available at* https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=40001JB4.PDF and EPA, *SO_2 Guideline Document*, EPA-452/R-94-008, at 2-17 (Feb. 1994), *available at* https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=2000H22J.TXT. Selected determinations are compiled as references, complete records of which are available through EPA's Model Clearinghouse Information Storage and Retrieval System (http://cfpub.epa.gov/oarweb/MCHISRS/), which contains several dozen communications, recommendations, and policy memoranda for case-specific ambient air determinations. EPA's "NSR Policy and Guidance Document Index" (https://www.epa.gov/nsr/new-source-review-policy-and-guidance-document-index) includes at least eight case-by-case determinations about ambient air, including three "recent" determinations made in 2007.

[11] *In re Hibbing Taconite Co*., 2 E.A.D. 838 (Adm'r 1989), *available at* https://www.epa.gov/sites/production/files/2015-07/documents/taconite.pdf (interpreting "access" as the "ability to enter" and determining a continuous fence was not necessarily required where other measures exist that would effectively preclude public access).

[12] *See* South Carolina, Dep't of Health & Envtl. Control, Final Determination and Final Notice of MACT Approval, Showa Denko Carbon Inc. at 39-40 (Jun. 8, 2012).

effective in deterring or precluding access to the land by the general public."[13] Under the Draft Revised Policy, the source still has to own or control the land but EPA recognizes the modern advancements in site security by replacing the "specific concept of a fence or other physical barriers with the more general concept of measures, which may include physical barriers, that are effective in deterring or precluding access by the general public."[14] While the Associations appreciate this recognition of technology, the recognition itself highlights that a physical barrier or limitation should never have been required. Rather, communication (*e.g.*, through "No Trespassing" signs) should have been enough and companies should not be compelled to take extraordinary measures to prevent access by people who ignore notice of private ownership.

> *EPA's shift to focus on the effectiveness of the measure, including signs or natural features, was supported by a Ninth Circuit case which upheld an EPA exclusion from the ambient air definition in an "overwater" situation—and characterized the criteria in EPA Administrator Costle's 1980 letter as "control of property" (not at issue in this Revised Draft Guidance) and "limited public access."*[15]

Under *Perez v. Mortgage Bankers Ass'n,* 135 S.Ct. 1199 (2015), EPA is free to change the policy from the 1980 Costle letter, but as the Ninth Circuit notes, EPA is simply interpreting one of the "core criteria" – "limited public access."

EPA indicates that the following types of measures are eligible under the Draft Revised Policy: no trespassing signs without a fence, swamps, large tracts of undeveloped private land, video surveillance and monitoring, routine security patrols, drones. EPA importantly recognizes that there may be other means yet to be developed. As EPA acknowledges, there have been advances in technology since the 1980 letter and limiting the ambient air exclusion to fences or other physical barriers is simply no longer warranted.[16]

Although EPA states that it seeks reasonable assurance that the general public will not be accessing property or is otherwise put on notice that the property should not be entered, EPA appropriately notes that whatever the basis for such a conclusion, it need not guarantee that access will never occur.[17] While even the tightest security can be, and has been, thwarted by those determined to illegally enter a facility,[18] that level of security should not be what is required here. The assessment of whether the general public will access should be focused on whether the "general public," which by definition should mean the law-abiding public, has adequate notice that the property in question is

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[13] Draft Revised Policy at 6-7 (emphasis in original).
[14] *Id*. at 6.
[15] *REDOIL v. EPA*, 716 F.3d 1155, 1165 (9th Cir. 2012) (upholding use of a Coast Guard "safety zone" to exclude an area from ambient air definition) (second emphasis.
[16] Draft Revised Policy at 5.
[17] *Id*. at 6.
[18] *See* U.S. Dep't of Energy, Office of Inspector Gen., *Special Report, Inquiry into the Security Breach at the National Nuclear Security Administration's Y-12 National Security Complex*, DOE/IG-0860 (Aug. 2012), *available at* https://www.energy.gov/sites/prod/files/IG-0868_0.pdf.

private and access is not authorized. The test should *not* be whether measures can be breached by some unauthorized person determined to do so.

2. The Revised Policy Should be Clear that Natural Features and Notice Are Sufficient.

Although the Draft Revised Policy mentions natural features and notice (*e.g.*, signs) with the intent that they can satisfy the policy, the language itself should be revised to ensure that it is not interpreted otherwise. For example, the language EPA includes that says, "where the owner or operator of the source employs measures" could be misinterpreted to require some affirmative action on the part of the source instead of passive reliance on existing topography such as cliffs or swamps. Indeed, EPA acknowledges that its general past position has been "that the second condition calls for a source to actually *take steps* to preclude the general public form accessing the property."[19] Contrary to this general position, EPA did go on to identify natural obstructions as a type of physical barrier that could qualify as "taking steps." This inconsistency in language creates uncertainty because reliance on passive "natural obstructions" is not generally considered to "take steps." From past determinations where EPA has found steep cliffs and rugged terrain to be effective physical barriers and the discussion in the Draft Revised Policy, it seems clear that EPA's intent is that passive natural features qualify as measures despite the language noted above. Likewise, the language in the Revised Policy, when finalized, should be clear that signs placing the public on notice that access is not authorized are sufficient.

To clarify that natural features and signs are indeed acceptable, the Associations request that EPA change the language in the Revised Final Policy to read:

> it is appropriate to exclude *the atmosphere over land owned or controlled by the stationary source, where there is signage or other means of notice, which signal that the land should not be accessed by the general public, or measures/conditions (e.g., physical, geographic, surveillance) which can reasonably be expected to inhibit such access*.

The policy should not be aimed at protecting knowing trespassers (be it for nefarious or innocuous purposes) but rather members of the general public who enter an area they should not be unwittingly. The suggested language is intended to capture that concept.

3. The Revised Policy Should Make Clear that Permit Conditions are Not Required for a Measure/Feature to be Considered Sufficient.

Permits typically have not included conditions addressing the "fence or physical barriers" that have been used to exclude an area from ambient air. Because it is not common practice to include fence specifications (*e.g.*, height of fence, type of fence, inspection of fence) as permit conditions, a facility should similarly not be required to

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[19] Draft Revised Policy at 3 (citing 2007 Guidance, *supra* note 6, attach. at 2-3, (June 22, 2007), *available at* https://www.epa.gov/sites/production/files/2015-07/documents/leaseair.pdf) (emphasis added)).

adopt specific technologies or criteria in order to utilize surveillance or other measures to inhibit public access. The final Revised Policy should make clear that particular permit requirements are not needed for a measure to be sufficient to justify an ambient air exclusion.

4. EPA Should Also Revisit Criterion 1: That the Source Owns or Controls Property, Giving it the Legal Right to Preclude Access.

Ambient air is "that portion of the atmosphere, external to buildings, to which the general public has access."[20] EPA has interpreted "ambient air" to necessarily include air over property that the source does not own or control, and has limited application of the "access" portion to such property. . The regulatory definition of ambient air, however, does *not* require ownership or control of the property, merely that the general public does not have access.[21] Thus, consistent with the Draft Revised Policy to clarify and modernize what is sufficient to conclude that the general public is not accessing the property, EPA has the discretion to reconsider the necessity of ownership or control. Ambient air should not include areas that are demonstrably not accessible to the general public (consistent with the averaging period and form of each standard)–even when such property is not under the source's control. Public access, *whether it is on a facility site or elsewhere*, is restricted if the general public (*i.e.*, a given reasonable person) is not able to remain or is not legally allowed to remain at a single location for the averaging time of the NAAQS or PSD increment. For this reason, the creation of the ownership/control requirement is unnecessary and eliminating it is consistent with the twin goals of the CAA as expressed in Section 101(b)(1).[22] It is further justified based on the probabilistic form of current NAAQS, which did not exist in the 1980s when the ambient air policies were developed.[23]

EPA has already taken steps to adjust its policies given new fact patterns not originally contemplated, which has taken the form of source-specific guidance, most notably in development of offshore energy resources. In these circumstances, the permit applicant has evaluated ambient air, with EPA's ultimate approval, based on a "safety zone" of 500 meters beyond the operation that is established and enforced by the United States Coast Guard. EPA justifiably concluded that "[t]he 'safety zone' approach represents a reasonable surrogate for a source's fence or physical barrier and thus could act as an

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[20] 40 C.F.R. § 50.1(e).
[21] *REDOIL*, 716 F.3d at 1164-65.
[22] 42 U.S.C. § 7401(b)(1) (declaring one of the purposes of the CAA to be "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population.").
[23] At the time of that 1980 policy decision, NAAQS were less stringent. The NAAQS for sulfur dioxide (SO_2) included 3-hour, 24-hour, and annual average deterministic standards (*i.e.,* of the form "not to be exceeded more than once per year"), applicable NAAQS for nitrogen dioxide (NO_2) included only an annual standard, and applicable NAAQS for Particulate Matter (PM) were expressed in terms of a 24-hour deterministic standard and annual average standard in terms of total suspended particulate. These standards were also of a different form than the probabilistic NAAQS EPA established in 1997 for fine PM containing particles less than 2.5 micrometers ($PM_{2.5}$) and 2010 for NO_2 and SO_2.

ambient air boundary."[24] When reviewing this issue for a subsequent offshore project in 2012, the EPA Environmental Appeals Board agreed that having a "fence" or constructed barrier was not necessary. The "important fact" was the result – access was limited.[25] This conclusion indicates that ownership or control of the land (or water) is not and should not be determinative.

EPA's 2007 Guidance illustrates the downsides of the ownership/control criterion . The so-called Page Memo evaluated nine hypothetical scenarios in terms of potentially complex business relationships in which "business invitees," lessors, and lessees might interact and access each other's controlled areas, consistent with conventionally narrow definitions and interpretations of ambient air.[26] The difficult to follow Page Memo shows the benefit of simplifying the analysis and focusing on the purpose of the provisions at issue.

EPA's ambient air policy should clarify that physical structures or areas (external to buildings) in which there is reasonable assurance that the public will not have prolonged exposure to the outside air do not constitute "ambient air," *regardless of ownership* of those structures or areas.

Example: Adjacent facilities with shared access limitations

It has become commonplace in certain industrial sectors for joint ventures or commercially related tenant entities to lease property from a host facility and carry out distinct business activities that are peripherally related to the host facility. In these instances the current ambient air policy is problematic from the perspective of NAAQS demonstrations. Generally, the current policy requires that the host's property be considered ambient air requiring modeling receptors from the tenant's perspective unless the host and tenant property can be considered a single source, even if access by the general public is excluded from the entire property by fencing and security checkpoints. In addition, the property leased to the tenant is considered to be ambient air requiring modeling receptors with respect to the host unless the host controls access to both the host and tenant properties. In these situations, access to all of the facilities on the property is limited to host employees and tenant employees, which are considered to be "business invitees" of the host entity. Nonetheless, the 2007 guidance dictates that the host's employees and its business invitees be considered the "general public" with respect to the tenant facility.[27] There is no sound policy basis for this interpretation, however, and EPA's 2007 guidance should be revised to make clear that restricting the "true" public's access to the

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[24] Letter from Steven Riva, Chief, Permitting Section, EPA Region 2 to Leon Sedefian, Air Pollution Meteorologist, New York State Dep't of Envtl. Conservation, (Oct. 9, 2007), *available at* https://www.epa.gov/sites/production/files/2015-07/documents/ambntoffshr.pdf.

[25] *In re Shell Gulf of Mexico, Inc.,* 15 E.A.D. at 514 n.56.

[26] 2007 guidance, *supra* note 6.

[27] *Id*. (EPA defined the "general public" in the 2007 Guidance "generally to include anyone who is not employed by or under control of the [source], but, more specifically, persons who do not require the source's permission to be on the property.").

entire site constitutes sufficient justification to exclude the entire site from consideration for modeling receptors for both the host and tenant entity.

In a related example, the current policy requires that the property of any adjacent facilities that are under common ownership but considered separate because they have different two-digit Standard Industrial Classification (SIC) codes generally must be modeled. As with the host/tenant relationship described above, there is no sound basis for this interpretation because the employees of both facilities are under common control and are thus distinct from the general public.

These situations should either be addressed by adopting a definition of ambient air without the "owned or controlled" requirement or *via* receptor placement guidance discussed in Section 5, below.

5. EPA Should Provide Additional Guidance to Address the Ambient Air Modeling Receptor Placement.

On April 12, 2018, President Trump issued a memorandum to the EPA Administrator directing that the agency take several actions to ensure that monitoring and modeling data is used appropriately in the context of state implementation plan actions for NAAQS and for permitting decisions.[28] In that memorandum, the President stated that EPA should seek to ensure that modeling tools are sufficiently accurate for their intended application. The Revised Draft Policy presents an opportunity for EPA to fulfill some of the directives in this Presidential Memorandum. There are significant issues that the Revised Draft Policy does not address and we urge EPA to consider addressing them either now or quickly after this first step is completed. In particular, in the attachment, *Ambient Air Boundary Test Cases,* we illustrate the practical consequences regulatory modeling stakeholders have identified for years; the selection of receptors to represent ambient air is critical because significant concentration gradients, irrespective of emission unit source type, exist within up to approximately 1,000 m immediately downwind of a source. It is within this distance that receptors are conventionally placed at which prolonged exposures are highly unlikely: railroads, roadways, waterways, and other locations that EPA continues to determine are ambient air because they are not under the legal ownership of the source, even though there are demonstrable legal or practical barriers to prevent an individual's exposure of the duration and frequency represented by an applicable standard. This significant difference in modeled concentrations is often the difference between demonstrating compliance with, or a simulated exceedance of, a NAAQS or PSD increment. It is critical that EPA take steps, and do so soon, to address these concerns as the policies of the Agency are hindering the productive capacity of the nation and are not benefiting human health and welfare.

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[28] Mem. from Pres. Donald Trump for Adm'r, EPA, *Promoting Domestic Manufacturing and Job Creation – Policies and Procedures Relating to Implementation of Air Quality Standards,* (Apr. 12, 2018), *reprinted in* 83 Fed. Reg. 16,761 (Apr. 16, 2018).

We agree with EPA's statement in the Draft Revised Policy, "EPA expects that this change in its ambient air policy will provide greater flexibility in determining where to place modeling receptors for air quality analyses, while maintaining public health protection."[29] But it will not do all that needs to be done. The Draft Revised Policy will affect receptor placement in *some* situations (property line v. "fenceline" of the source), EPA needs to address in this policy or in future policies or rulemakings the remaining numerous concerns with the current modeling guidance on receptor placement.

Often, the current ambient air policy requires placement of modeling receptors such that the "controlling receptors" (those at which modeled design concentrations are computed to occur) are found to be located in areas where there is–in reality–a low likelihood of public exposure and potential adverse impact. EPA's ambient air policy is overly conservative in requiring impact evaluation anywhere any person could access (even by illegally trespassing), for any amount of time, rather than considering only locations to which the general public legitimately and realistically has access.

This problem is not new, as evidenced by the fact that President Trump issued a memorandum addressing these issues. As acknowledged in the Draft Revised Policy, stakeholders have requested that EPA reconsider "the need to demonstrate NAAQS attainment just beyond the property boundary in areas where few or no members of the general public are expected to be present."[30] Examples of such areas include roads, railways, and waterways that bound a source's property. Such concerns are equally applicable to roads, railways, and waterways that transect the property. Under current guidance and the Draft Revised Policy, receptors can be required to be placed in such areas despite existing restrictions on the general public's practical and legal ability to remain there for any appreciable length of time. The Draft Revised Policy also does not address allowing ambient air model receptor locations to take into account the form of the NAAQS (*e.g.*, the 1-hour NO_2 NAAQS which is based on the 3-year average of 98th percentile of the yearly distribution of 1-hour daily maximum concentrations).

Moreover, EPA generally supports use of risk-based decision making and has specifically identified air quality exposures as an assessment ripe for risk-based analysis of air quality impacts, stating, "[o]verestimation may occur because of the inclusion of unrealistic or irrelevant situations (e.g., assuming continuous exposure to an intermittent airborne contaminant source rather than accounting for mobility throughout the day)."[31] Adjustment of ambient air policies is particularly critical–and most logical–for the annual average $PM_{2.5}$ NAAQS, which EPA expressly intended to be the "generally controlling" standard.

To address these concerns, EPA needs to issue further guidance on receptor placement that considers both the form of the standards being modeled against and how the ambient air models work. See Attachment - *Ambient Air Boundary Test Cases*

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[29] Draft Revised Policy at 5.
[30] *Id.* at 4.
[31] EPA, Risk Assessment Forum White Paper: Probabilistic Risk Assessment Methods and Case Studies, EPA/100/R-14-004, at 15-16 (July 2014), *available at* https://www.epa.gov/sites/production/files/2014-12/documents/raf-pra-white-paper-final.pdf.

for examples to support such guidance. The guidance should consider the frequency and duration of potential exposure to ambient air locations. In unique circumstances beyond the situations identified in such a policy, EPA should defer to state permitting agencies' authority within their regulatory programs to determine the areas necessary to include in the ambient air analysis to assess whether a particular project will cause or contribute to a modeled NAAQS or increment exceedance.

We offer the following recommendations to implement an modeling receptor placement policy that would allow economic growth and continue to protect human health and welfare as directed by the CAA.[32]

5.1. The Determination of Modeled Receptor Locations Should Consider the Frequency and Duration of Potential Exposure to Ambient Air Locations.

EPA's longstanding interpretation has inappropriately applied the definition of ambient air so as to protect *any* public exposure, regardless of the *likelihood* or *duration* of that exposure. For example, EPA previously determined in 1987 that "receptors should be placed over any body of water not privately owned or which allow public access . . . the air above a body of water should be considered ambient air as long as the potential for public exposure exists."[33] As another example, EPA determined in 1983 that "[r]egardless of the period of exposure at a given site (or receptor), ambient air is defined in terms of public access not frequency of access, length of stay, age of the person, or other factors."[34]

The fundamental statutory and regulatory basis for the NAAQS is based on periods of exposure. It follows, therefore, that regulatory modeling to demonstrate compliance with a NAAQS established to protect human health and welfare should only involve placing receptors in locations with a realistic potential for there to be an impact on public health and welfare. In other words, it should only place receptors where exposure to the general public is likely to occur and where that exposure would likely last for the duration of the averaging period.

A change in policy is appropriate given that EPA's historical approach to ambient air assessments was formulated before the current slate of stringent NAAQS that are probabilistic, not deterministic. Specifically, the current 1-hour NO_2 and SO_2 NAAQS are evaluated based on the 98th and 99th percentile, respectively, of daily maximum 1-hour concentrations, which translates into 7 days and 3 days per year, respectively, during which a single individual might be exposed before reaching a level above the

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[32] 42 U.S.C. § 7401(b)(1) (declaring one of the purposes of the CAA to be "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population").

[33] EPA, *SO_2 Guideline Document*, EPA-452/R-94-008, at 2-18 (Feb. 1994) (1994 SO_2 Guideline Document), *available at* https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=2000H22J.TXT.

[34] *Id*. (citing Mem. from Darryl D. Tyler, Dir., Control Programs Dev. Div., EPA to A. Davis, Dir. Air & Waste Mgmt. Div., Region VI (May 26, 1983) (1983 guidance), *reprinted in* EPA, *SO_2 Guideline Appendices*, at 30 EPA-450/2-89-019, (Oct. 1989), *available at* https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=40001JB4.PDF.

NAAQS. This same principle applies for the 24-hour $PM_{2.5}$ NAAQS, which is evaluated at the 98th percentile. The form of these newer NAAQS now means that the frequency of exposure matters, contrary to EPA's 1983 guidance that recommended against accounting for the frequency or duration of exposure for the former deterministic standards.[35] Accordingly, those locations that can be demonstrated to be populated for a shorter duration and less frequently than the statistical form of the standard should not be eligible for placement of receptors in the model.

Similarly, ambient air receptors for long-term averaging periods, such as the annual average $PM_{2.5}$ NAAQS, should be evaluated with regard to the requisite duration of exposure for a single individual. As EPA's 1992 guidance recognized,[36] it is simply implausible that an individual would be present and exposed at certain locations for the entire duration of an annual averaging period. Railways, public roadways, and waterways are common examples where an individual could not plausibly be expected to be present for such a long time period.

That this approach means that different pollutants–or even different averaging periods of one pollutant–may necessarily have different modeling receptor locations is not problematic. It is entirely consistent with the way that EPA has evolved its establishment of NAAQS.

5.2. Off-Property Guidance on Receptor Placement is Appropriate Where the General Public Is Unlikely to Access for the Duration of the Averaging Period.

There are certain locations that should, by definition, not be considered for receptor placement, such as roadways, "through" railway lines, lakes, and rivers regardless of ownership or control,[37] even if it is on property the source owner does not control. In such locations, it is not likely or, in some situations, even possible for an individual to be in one location for more than a small fraction of the applicable standard averaging time. In the case of roadways or railways, this is because passing traffic makes it unsafe and typically illegal for the public to stay for a prolonged period. With respect to flowing water bodies, the public cannot realistically stay in one place very long. Due to the probabilistic form of some of the current NAAQS (which require multiple occurrences of concentrations above a specified level averaged over multiple years), the possibility of the public being exposed over multiple days during a given year would be required for an area to be considered ambient air. For example, along road sections where stopping is prohibited except in emergencies, it would be irrational to expect multiple emergencies to occur in one location for the same person. Consequently, such locations should not require modeling receptors.

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[35] 1983 Guidance at 1.

[36] *See, e.g.*, Letter from John S. Seitz, Director, EPA OAQPS, to Daniel Gutman, (Apr. 13, 1992).

[37] Virtually any large manufacturing operation is likely to receive raw materials and ship products by road, rail, and/or water and is therefore likely to face "ambient air" issues with respect to areas of restricted or *de minimis* access within and just beyond its private property.

When considering situations involving facilities with adjacent properties that are not under common control, receptors should not be required on the combined properties (no matter which facility is being modeled) when the facilities share activities and/or infrastructure that results in frequent exchanges of employees between/among the facilities. The ability to allow joint ventures and other enterprises on and adjacent to plant property is crucial to the business objectives of many companies and often leads to environmental and energy benefits that might not otherwise be realized. Consequently, receptor placement that hinders such synergies should be updated. Facility property and areas on that property to which business invitees have access should not be require modeling receptors because the general public does not have "access" (the owner's permission) to be on any of this private property.

Adoption of these approaches would allow permit applicants to make case-by-case determinations based on the factual circumstances of general public access within, and potentially beyond, their property boundaries. This approach would complement a policy to consider the frequency and duration of general public access, for areas including (but not limited to) railways, roadways, and waterways, where transient access is possible, but prolonged access is demonstrably unlikely, inherently risky, and illegal. For example, most states have enacted laws to prohibit pedestrian travel on roadways or to loiter in a stationary location.[38] Similarly, Court decisions have determined that walking along a railway is criminal trespass and only transient crossing is allowed.[39] EPA's policies should not presume violations of such laws.

5.3. Illustrative Examples

The following are examples of situations where additional guidance as to what constitutes ambient air is needed.

Example 1: A road, railroad, or stream transects property boundaries and public will not be exposed over the length of the averaging period.

According to current guidance, public roads, railroads, and public streams or other waterways that transect a facility's boundaries require modeling receptors.[40] This guidance is problematic from a dispersion modeling perspective, especially when such areas are in close proximity to ground-level fugitive emission sources.[41] Regulatory agencies should have the discretion to exclude such areas from receptor placement, particularly where it is also unlikely that the public will be exposed over the length of the averaging period (*e.g.*, they will not congregate within the facility's boundaries on the

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[38] N.C. GEN. STAT. ANN. § 20-174.1 ("Standing, sitting or lying upon highways or streets prohibited. (a) No person shall willfully stand, sit, or lie upon the highway or street in such a manner as to impede the regular flow of traffic. (b) Violation of this section is a Class 2 misdemeanor.").

[39] *See Weatherly v. Nashville, C. & St. L. Ry.*, 166 Ala. 575, 51 So. 959, 961 (Ala. 1909) ("Except at public crossings and a few other places, the track and right of way of a railroad are its exclusive property, upon which a stranger has no right to be . . ..").

[40] *See, e.g.,* Letter from R. Scott Davis, Chief, Air Planning Branch, EPA Region 4, to Ronald W. Gore, Chief, Air Division, Alabama Dep't of Envtl. Mgmt. (Sept. 9, 2011).

[41] *See* Attachment.

side of the road or on the stream for an extended period of time and it is unlawful for the public to trespass on railroad property).

Example 2: Barriers outside of source-owned or -controlled property where the general public will not be exposed over the length of the averaging period.

According to current guidance, areas adjacent to, but not owned or controlled by, the source are considered ambient air and require modeling receptors regardless of the public's inability to access it. For example, consider a facility has a railroad track running parallel to its fenceline. The railroad owns the small strip of land between the track and the facility's fence; therefore, anyone in that area would be trespassing. When trains are on the track, they would block access to the area between the fence and the railroad tracks. Even though the strip of land between the fence and the railroad is not owned by the facility, it is contiguous to the facility and the public is restricted from being in this area. Therefore, the railroad track and right of way should not require receptor placement in that area for this facility.

CONCLUSION

The Associations appreciate EPA's willingness to update its ambient air policy and urges it to make the changes recommended above.

Attachment: Ambient Air Boundary Test Cases

Attachment

Ambient Air Boundary Test Cases

The delineation of the ambient air boundary for use in regulatory dispersion modeling analyses is critical because the model design concentration frequently occurs at the nearest receptor to an emission unit (*e.g.*, a point source affected by building downwash or a ground-level fugitive emission represented as an area or volume source) in typical simple terrain applications. Stakeholders have long contended that certain areas proximate to the source, such as railroads, roadways, or waterways that run along the edge of or traverse the source's property, can justifiably be excluded from ambient air in situations where an individual would not reasonably or legally be present during the relevant averaging period of each applicable standard. Such a determination would realistically simulate the locations at which the general public would potentially be exposed and effectively extend the distance from emission units to the ambient air boundary.

Simple dispersion modeling analyses demonstrate the practical importance of a realistic ambient air receptor determination, indicating that a significant concentration gradient[1] exists downwind of a typical emission unit and the resulting model design concentration for all the relevant averaging periods considered in National Ambient Air Quality Standards (NAAQS) and Prevention of Significant Deterioration (PSD) increment analyses. The steep gradient illustrates that selection of ambient air receptors is critical and can be determinative of the outcome of a regulatory modeling analysis because small changes in distance from emission units to the ambient air boundary can make a significant difference in model design concentrations that are compared to applicable standards used to set emission limits and authorize permits.

Model Inputs

Dispersion modeling was conducted using the latest version of AERMOD (v18081) and the various pre-processors that comprise the regulatory modeling platform. Two types of sources were considered in the modeling analyses: (1) a typical industrial boiler represented by a POINT source and (2) a generic fugitive emission unit represented by a VOLUME source. Each was modeled with a normalized emission rate (1.0 g/s) and the following source parameters:

- Industrial Boiler (POINT)
    - Stack height = 100 ft (30.48 m)
    - Stack diameter = 7.5 ft (2.29 m)

[1] The U.S. Environmental Protection Agency (EPA) has recommended the "significant concentration gradient criterion" be used to evaluate aspects of regulatory dispersion modeling analyses, in particular the selection of nearby sources to be simulated. EPA concedes the term has not been specifically defined in Appendix W but became increasingly important upon implementation of the 1-hour nitrogen dioxide (NO_2) and sulfur dioxide (SO_2) NAAQS. *See, e.g.*, Mem. from Tyler Fox, Leader, Air Quality Modeling Grp. EPA to Reg'l Air Div. Dirs., *Additional Clarification Regarding Application of Appendix W Modeling Guidance for the 1-hour NO_2 National Ambient Air Quality Standard*, (Mar. 1, 2011) (March 2011 Clarification Memorandum), *available at* https://www.epa.gov/sites/production/files/2015-07/documents/appwno2_2.pdf.

    - Exhaust temperature = 150 ˚F (338.71 K)
    - Exhaust velocity = 40 ft/s (12.19 m/s)
- Generic Fugitive Source (VOLUME)
    - Volume Height = 20 ft (6.096 m)
    - Release Height = 10 ft (3.048 m) or half the volume height
    - Initial lateral dimension (syinit) = 4.65 ft (1.42 m) based on a volume width of 20 ft
    - Initial vertical dimension (szinit) = 9.3 ft (2.84 m) based on a surface-based volume

Direction-specific downwash parameters for the POINT source were developed using BPIP-PRIME based on a 75 ft tall boiler building.

Note that only the 24-hour and annual averaging periods were used to evaluate the fugitive VOLUME source since they are the only relevant averaging periods for fugitive particulate emissions.

A 5-km Cartesian receptor grid using local coordinates was developed with flat terrain using the following grid spacing:

- Stack Location to 1,000 meters at 100-meter spacing;
- 1,000 meters to 2,500 meters at 250-meter spacing
- 2,500 meters to 5,000 meters at 500-meter spacing

To provide a variety of meteorological conditions, three sets of meteorological data from different regions of the United States were used in the analysis: Albany, Georgia; Portland, Oregon; and Portsmouth, New Hampshire.

Analysis of Results

Modeling was conducted assuming a NAAQS analysis for the 1-hour NO_2, 1-hour SO_2 and 24-hour and annual fine particulate matter containing particles less than 2.5 micrometers ($PM_{2.5}$) standards and results were generated for the form of each standard:

- 1-hour NO_2 – 98^{th} percentile of the 1-hour daily maximum concentration
- 1-hour SO_2 – 99^{th} percentile of the 1-hour daily maximum concentration
- 24-hour $PM_{2.5}$ – 98^{th} percentile of the maximum 24-hour concentration
- Annual $PM_{2.5}$ – 5-year average annual concentration

After the maximum concentration was located, the percent difference relative to the maximum concentration was calculated at all other receptor locations and then plotted versus distance. For all averaging periods and for both the POINT and VOLUME source types, the model design concentration was located less than 400 m from the emission point and the plots, presented below, show that there is a steep gradient within 1,000 – 1,500 meters from the maximum concentration with greater than 80% difference

in model concentration for the 1-hour averaging periods and a greater than 90% difference in model concentration for the 24-hour and annual averaging periods. Beyond 1,500 meters the concentration gradient flattens for all averaging periods. The results vary slightly depending on, but are consistent regardless of, the meteorological data set simulated. These results confirm EPA's "rule of thumb" to characterize significant concentration gradients for 1-hour averaging periods ("the distance to maximum 1-hour impact and the region of significant concentration gradients that may apply in relatively flat terrain is approximately 10 times the source release height")[2] that is evident for longer term averaging periods as well.

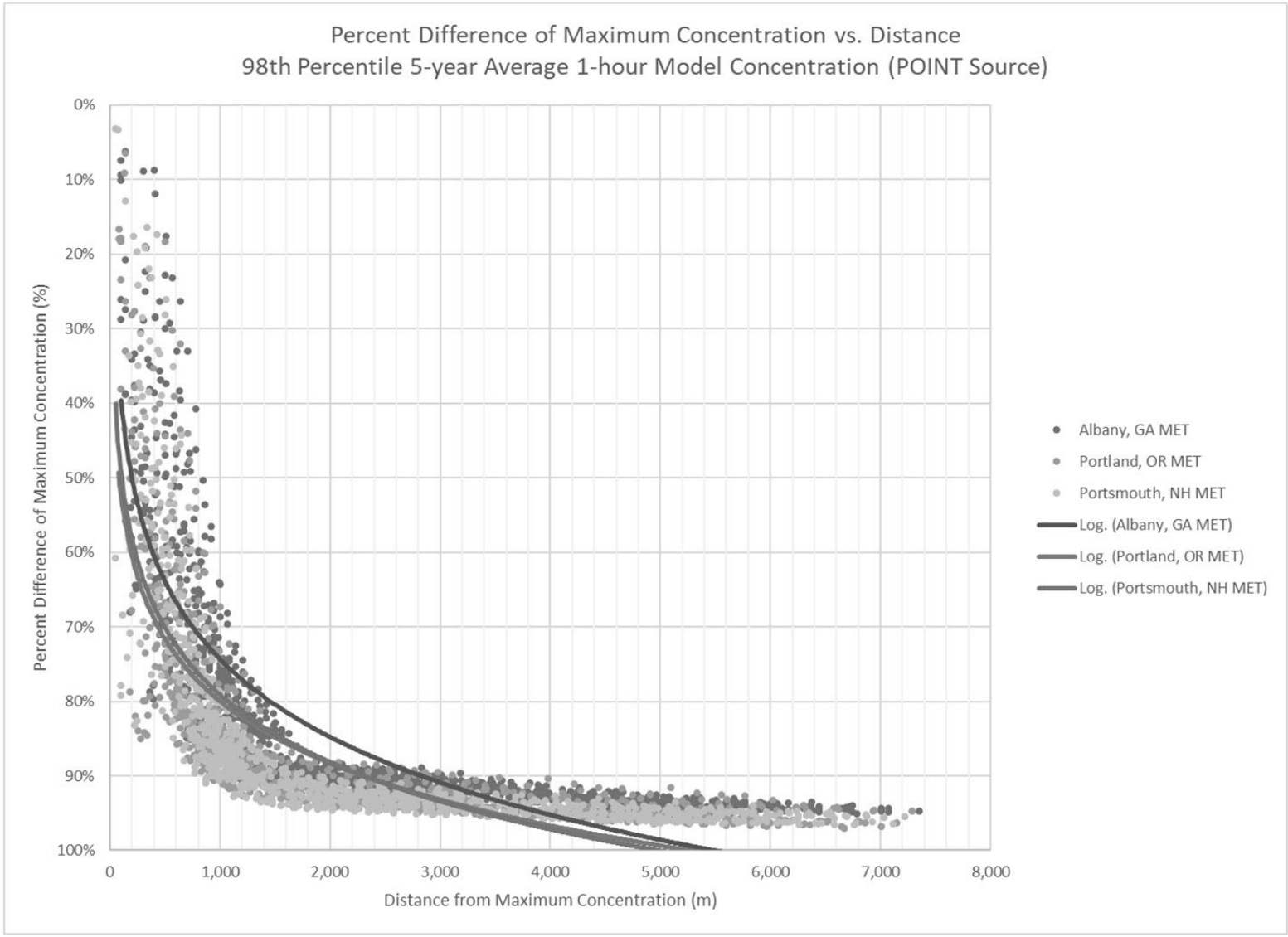
The magnitude of the downwind concentrations gradients is significant in the regulatory sense; in other words, the difference in model design concentration that results over a short distance is typically much greater than the significant impact levels for each pollutant and averaging period.

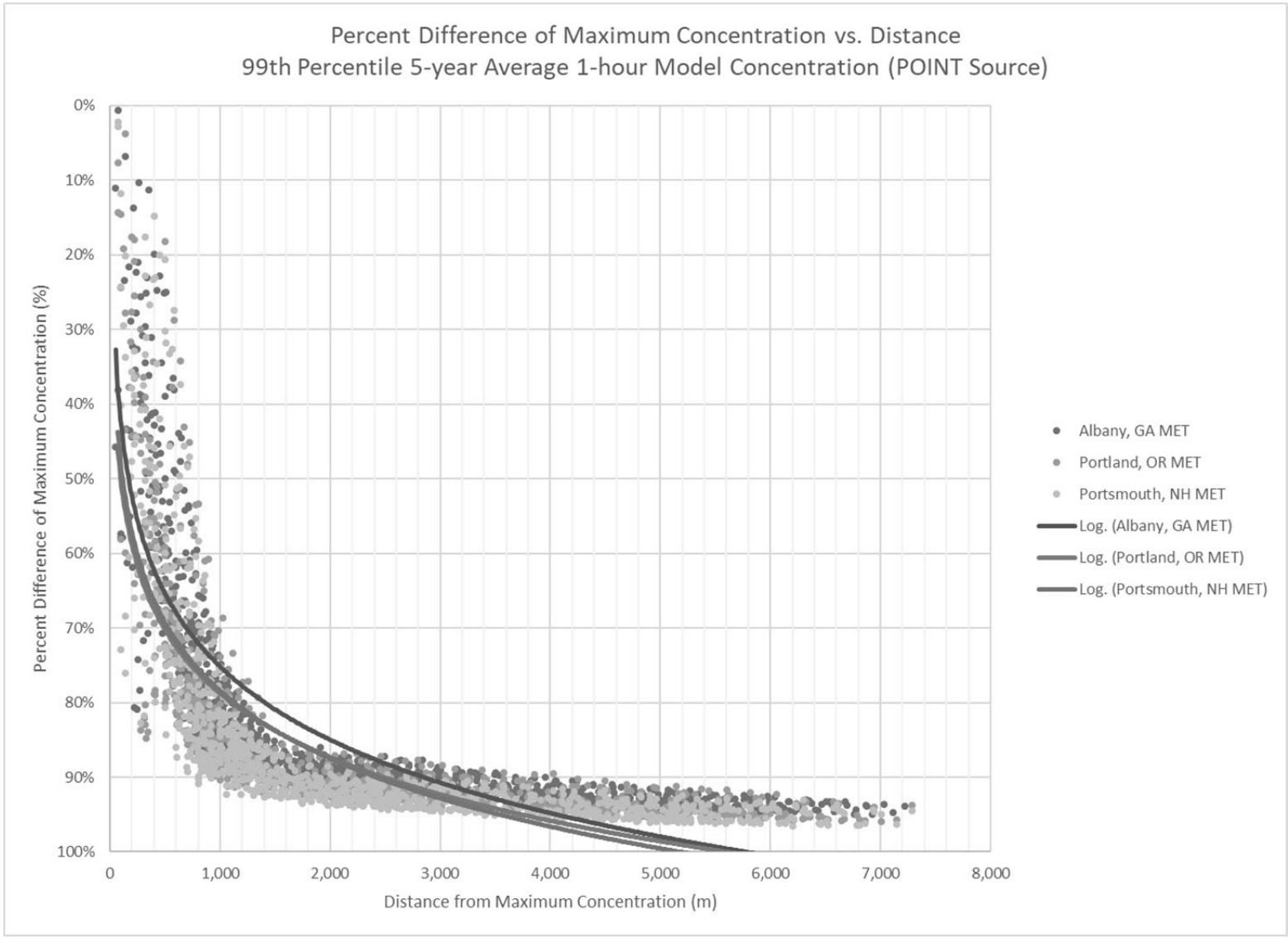
- For the 1-hour averaging period, modeled concentrations just 100 m downwind of the modeled design concentration are 30% to 40% less and 500 m downwind are 60% less. For example, a modeled 1-hour NO_2 design concentration of 200.0 $\mu g/m^3$ would be 140.0 $\mu g/m^3$ 100 m further downwind and 80 $\mu g/m^3$ 500 m downwind, differences much greater than the 7.5 $\mu g/m^3$ 1-hour NO_2 Significant Impact Level (SIL).
- For the 24-hour averaging period considering a POINT source, modeled concentrations just 100 m downwind of the modeled design concentration are 50% less and 500 m downwind are 75% less. For example, a modeled 24-hour $PM_{2.5}$ design concentration of 30.0 $\mu g/m^3$ would be 15.0 $\mu g/m^3$ 100 m further downwind and 7.5 $\mu g/m^3$ 500 m downwind, differences much greater than the 1.2 $\mu g/m^3$ 24-hour $PM_{2.5}$ SIL. Similar results are seen in the modeling analyses using a VOLUME source, though the model design concentrations at 500 m downwind are closer to 90% less than the maximum concentration.
- For the annual averaging period considering a POINT source, modeled concentrations just 100 m downwind of the modeled design concentration are 30% less and 500 m downwind are 70% less. For example, a modeled annual $PM_{2.5}$ design concentration of 10.0 $\mu g/m^3$ would be 7.0 $\mu g/m^3$ 100 m further downwind and 3.0 $\mu g/m^3$ 500 m downwind, differences much greater than the 0.2 $\mu g/m^3$ annual $PM_{2.5}$ SIL. As with the 24-hour averaging period, similar results are seen in the modeling analyses using a VOLUME source with the model design concentrations at 500 m downwind closer to 90% less than the maximum concentration.

The preceding results confirm the practical consequences regulatory modeling stakeholders have identified for years; the selection of receptors to represent ambient air is critical because significant concentration gradients, irrespective of emission unit source type, exist within up to approximately 1,000 m immediately downwind of a source. It is within this distance that receptors are conventionally placed at which prolonged exposures are highly unlikely: railroads, roadways, waterways, and other

[2] March 2011 Clarification Memorandum at 15-16.

locations that EPA continues to determine are ambient air because they are not under the legal ownership of the source, even though there are demonstrable legal or practical barriers to prevent an individual's exposure of the duration and frequency represented by an applicable standard. This significant difference in modeled concentrations is often the difference between demonstrating compliance with, or a simulated exceedance of, a NAAQS or PSD increment.


Percent Difference of Maximum Concentration vs. Distance
98th Percentile 5-year Average 1-hour Model Concentration (POINT Source)
Percent Difference of Maximum Concentration (%)
0%
10%
20%
30%
40%
50%
60%
70%
80%
90%
100%
0
1,000
2,000
3,000
4,000
5,000
6,000
7,000
8,000
Distance from Maximum Concentration (m)
Albany, GA MET
Portland, OR MET
Portsmouth, NH MET
Log. (Albany, GA MET)
Log. (Portland, OR MET)
Log. (Portsmouth, NH MET)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Percent Difference of Maximum Concentration (%)
0%
10%
20%
30%
40%
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6,000
7,000
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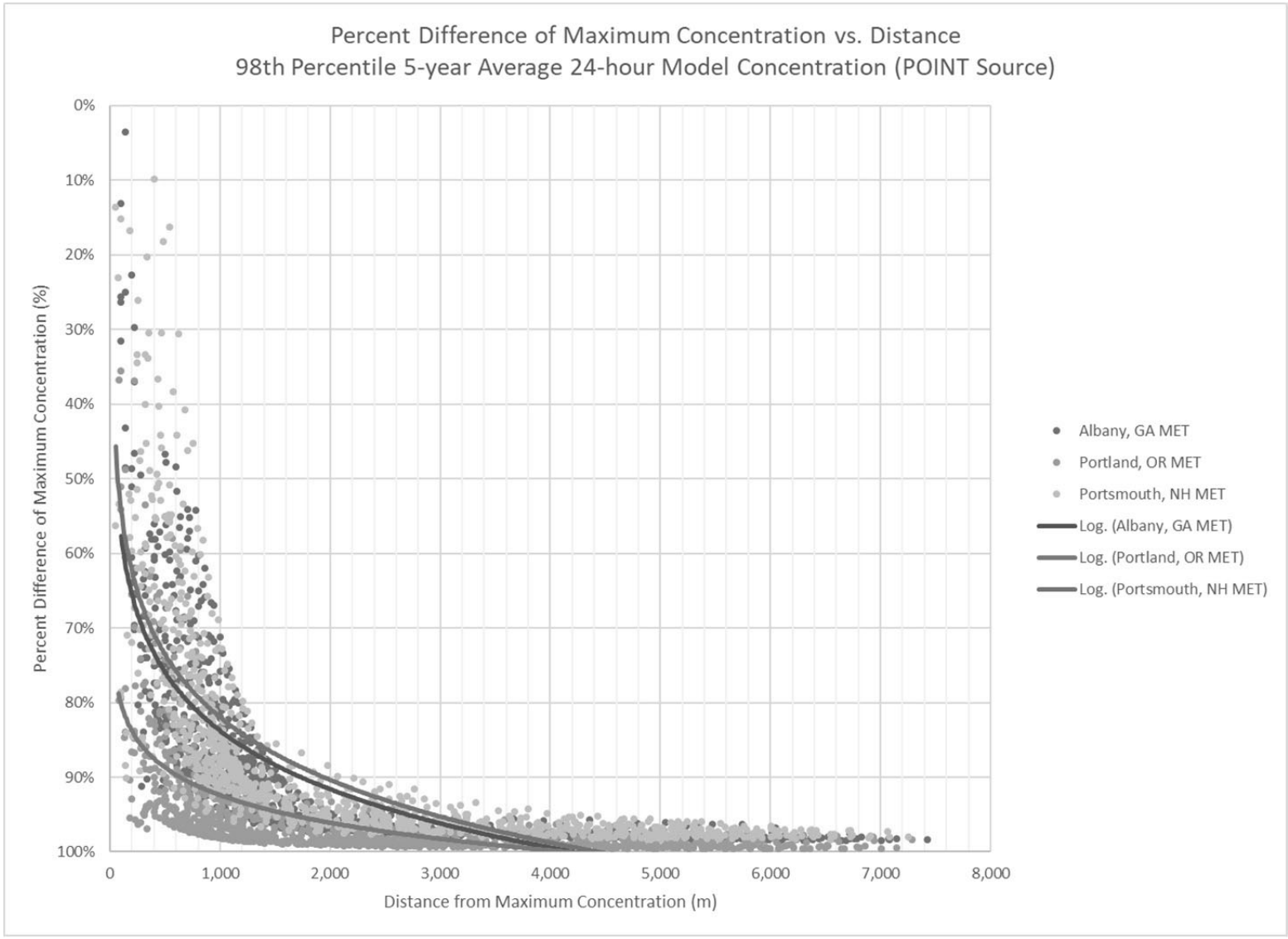
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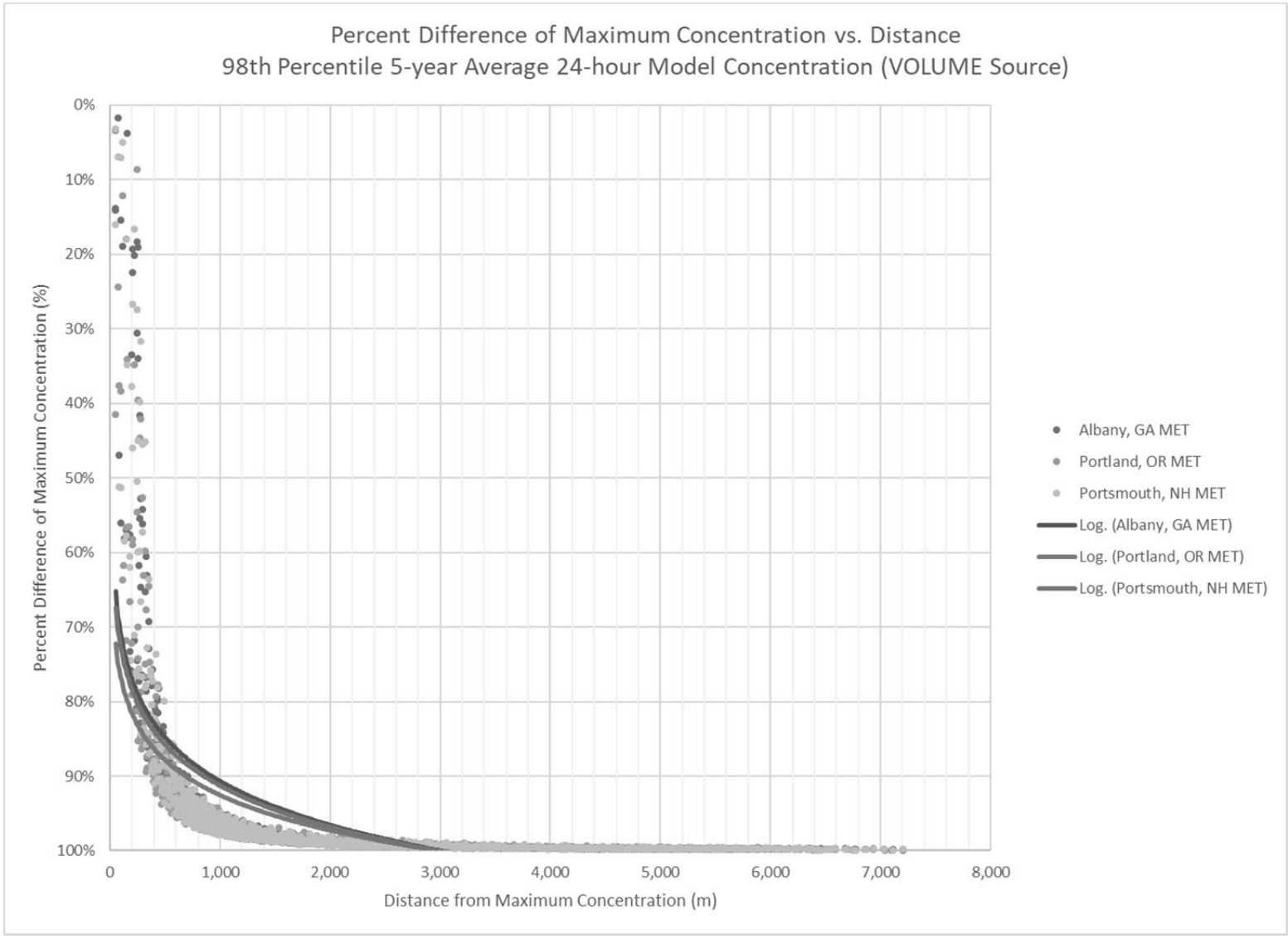
Percent Difference of Maximum Concentration vs. Distance
98th Percentile 5-year Average 24-hour Model Concentration (VOLUME Source)
Percent Difference of Maximum Concentration (%)
0%
10%
20%
30%
40%
50%
60%
70%
80%
90%
100%
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1,000
2,000
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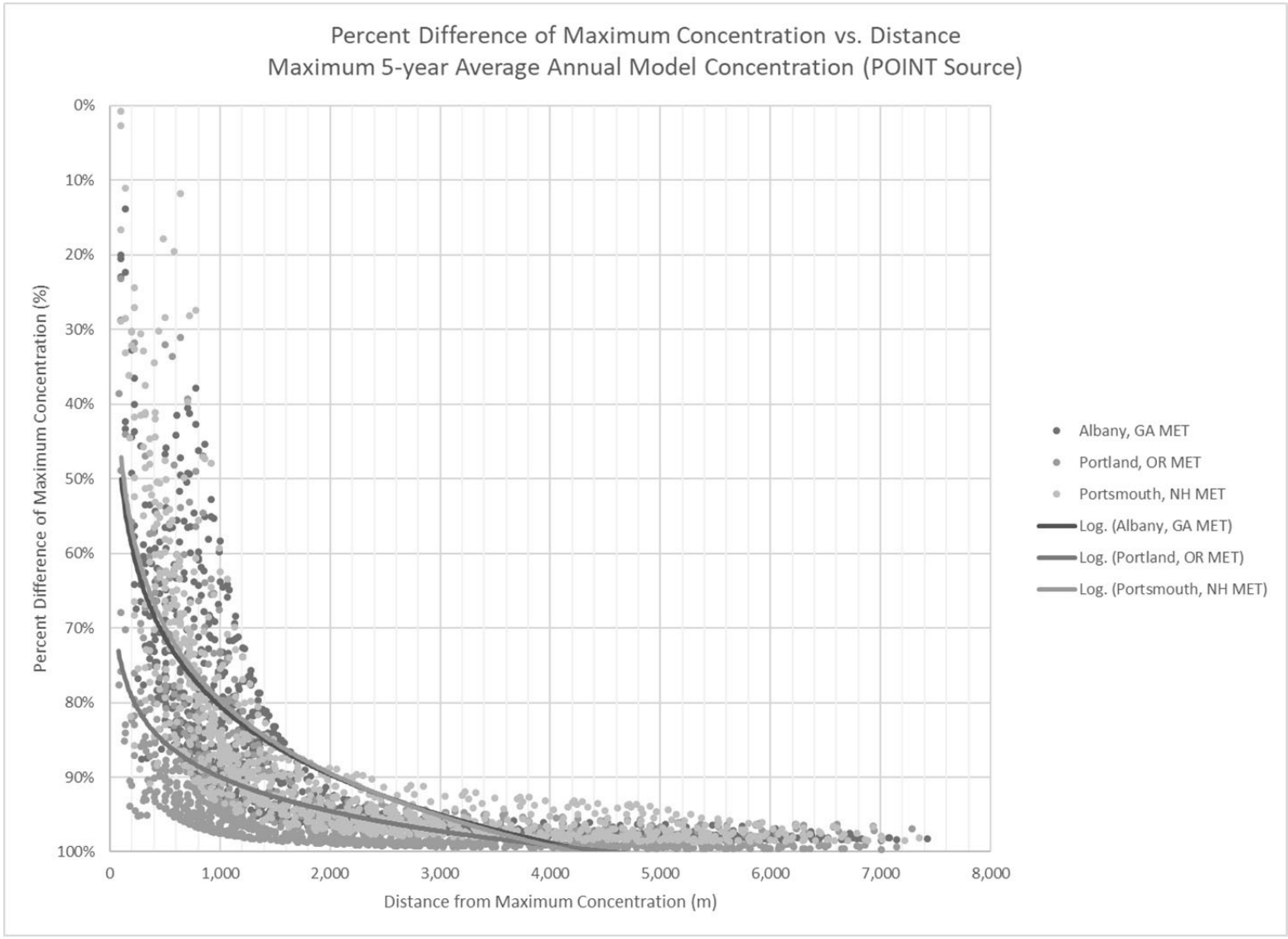
Percent Difference of Maximum Concentration vs. Distance
Maximum 5-year Average Annual Model Concentration (POINT Source)
Percent Difference of Maximum Concentration (%)
0%
10%
20%
30%
40%
50%
60%
70%
80%
90%
100%
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1,000
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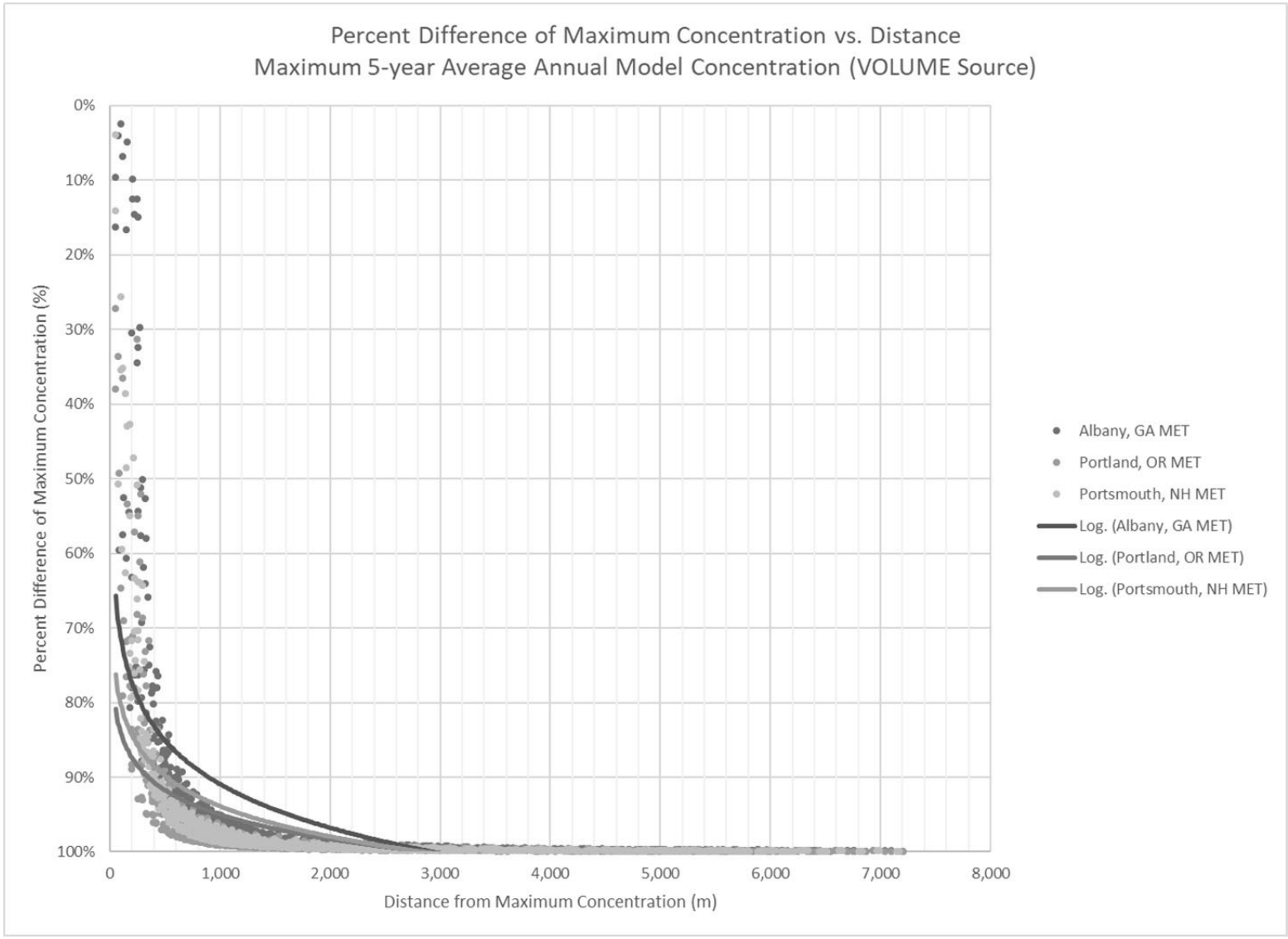
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